Supreme Court, U. S.
FILED
DEC 26 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1004

SOUTHEASTERN PROMOTIONS, LTD.,
PETITIONER,

v.

STEVE CONRAD, ET AL.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Southeastern Promotions, Ltd. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 30, 1973, and the judgment and opinion denying the petition for rehearing and suggestion of rehearing *en banc* entered on October 30, 1973.

Opinions Below

The opinion of the district court is reported at 341 F. Supp. 465 (E.D. Tenn. 1972) and appears in the appen-

dix at pages 28-55. The original opinion of the court of appeals and the opinion of the court denying rehearing are not yet officially reported. They appear in the appendix at pages 56 and 69, respectively.

Jurisdiction

The judgment of the court of appeals was entered on May 30, 1973. A timely petition for rehearing and suggestion of rehearing *en banc* was filed and was denied by the court on October 30, 1973. This petition for certiorari was filed within 90 days of that date. Jurisdiction is invoked under 28 U.S.C. § 1254.

Questions Presented

1. (a) In denying petitioner permission to produce HAIR in the Chattanooga Municipal Theater because of its contents did respondents violate the first and fourteenth amendments to the constitution of the United States by utilizing constitutionally impermissible criteria under an ordinance which was wholly lacking in criteria and which did not require respondents to seek judicial review?

(b) Is this decision in conflict with the decisions of the Fifth and Tenth Circuits in *Southeastern Promotions, Ltd.* v. *City of West Palm Beach*, 457 F.2d 1016 (5 Cir. 1972); *Southeastern Promotions, Ltd.* v. *Oklahoma City, Okla.*, 459 F.2d 282 (10 Cir. 1972); see also *Southeastern Promotions, Ltd.* v. *City of Mobile, Ala.*, 457 F.2d 340 (5 Cir. 1972)?

2. Did the courts below apply impermissible criteria in concluding that HAIR was obscene?

3. Is HAIR obscene?

Constitutional Provisions Involved

The First and Fourteenth Amendments to the Constitution of the United States.

Statement of the Case

The relevant facts are readily summarized below. It is, however, important that they be placed in a larger perspective. They are representative of an apparently unending series of attempts by local officials to prevent the showing of the rock-musical HAIR.

HAIR is a musical which deals with the life styles of many young people and their attitudes on the Vietnam war, racism, sex, drugs, pollution, etc. It has been produced in 140 American cities and in fourteen cities throughout the remainder of the world. HAIR is the most popular box office attraction in the history of American theatre (Tr. Vol. 3, p. 342). In the past few years, HAIR's road companies began to show in various smaller cities and towns throughout the southeastern and southwestern part of the United States. Frequently HAIR sought access to municipal facilities because in smaller communities they are the only or the best available places for performance. Despite the fact that these facilities have *without exception* routinely been made available for plays, municipal auditorium and theatre managers, supported by city officials, claim an unfettered right to determine which plays will be permitted to show and which will not. And time and time again HAIR's content — its "anti-establishment" views — collided with the different prepossessions of these municipal officials.

At plaintiff's[1] request federal district courts have issued injunctions against municipal officials on the ground that their assertion of unfettered censorial discretion is wholly inconsistent with the constitutional guarantee of free speech secured by the fourteenth amendment.[2] The few district courts which denied relief were reversed on appeal. *Southeastern Promotions, Ltd.* v. *City of West Palm Beach,* 457 F.2d 1016 (5 Cir. 1972); *Southeastern Promotions, Ltd.* v. *Oklahoma City, Okla.,* 459 F.2d 282 (10 Cir. 1972); see also *Southeastern Promotions, Ltd.* v. *City of Mobile, Ala.,* 457 F.2d 340 (5 Cir. 1972).

A. *Proceedings in the District Court*

This case began in "routine" fashion. Plaintiff was refused access to the municipal theatre (the "Tivoli Theater") and it brought an action in the appropriate district court. *Southeastern Promotions, Ltd.* v. *Conrad,* 341 F. Supp. 465. Like their counterparts elsewhere, these defendants asserted a series of paper-thin defenses which have been uniformly unsuccessful, and which were rejected in the court below. (341 F. Supp. at 468-71.) The heart of the defense, however, was the same claim unequivocally rejected by the Fifth and Tenth Circuits: defendants asserted, just as did the municipal officials in *Mobile, West Palm Beach* and *Oklahoma City,* that they had an essentially unfettered right to determine what plays would be exhibited and what would not. Defendants rejected the play as "not in the best interest of the community", and because it was not "clean, healthful and culturally uplifting" (p. 10, infra). The district judge, however, did not squarely focus on the standards used because *at the trial* defendants asserted for the first time that HAIR was obscene, and accordingly, they were under no obligation to permit its exhibition.

[1] For convenience, the parties are referred to by their designations in the district court. In this case plaintiff-appellant is the promoter of HAIR, that is, it has a contract arrangement with the New Hair Company, the owner of the play, to produce the play.

[2] Some of the district court cases are collected in *Southeastern Promotions, Ltd.* v. *City of Mobile,* 457 F.2d 340, 341 (5 Cir. 1972).

In a most unusual response, the judge empaneled an advisory jury which heard evidence and (without seeing the play) returned a verdict of obscenity (341 F. Supp. at 472). The judge agreed with this result. *Without seeing the play,* he made findings of fact and concluded that HAIR was obscene. (341 F. Supp. at 472-77) In so doing, the judge recognized that he had reached this conclusion despite the fact that the play had been performed in 140 cities throughout the United States and had been found by four other federal courts not to be obscene. (*Id.* at 474) The judge's ruling (*id.* at 475-76) rests entirely on his attempt to carve a play into speech and *two* levels of "conduct" — that which is "illustrative" of the speech and that which is not — and to treat the latter "conduct" as wholly beyond the protection of the free speech guarantee. Such an analysis is, so far as we can ascertain, wholly without basis in the decisions of any court.

B. *The Proceedings In The Court Of Appeals*

On appeal, the Sixth Circuit, over the dissent of Judge McCree, affirmed. Judge O'Sullivan and Judge Weick each wrote opinions for the majority. Judge O'Sullivan's opinion (pp. 56-64) simply adopts the reasoning of the district court, and then contains a holding that the speech itself is obscene (p. 62). *His opinion does not address a single argument raised by plaintiffs* nor does it contain a single citation in support of his holding. Judge Weick's concurring opinion describes HAIR — a play neither he nor

Judge O'Sullivan has ever seen — as one which "involves only depraved sexual action" (p. 65). Judge Weick so characterized a play which has been viewed by millions of theatre goers in New York, Los Angeles, Chicago, San Francisco, Seattle, Las Vegas, Boston, Memphis and Nashville, not to mention citizens in virtually every major capital of the Western world as well as Tokyo, Sydney, and Tel Aviv. No other court has found the play obscene.

A petition for rehearing and suggestion of rehearing *en banc* were filed. On October 30, 1973, the suggestion for *en banc* consideration was denied, Judge Edwards and Judge McCree dissenting. (p. 69) The petition for rehearing was then denied by the original panel, Judge McCree again dissenting. (pp. 74-76) In his dissent, Judge Edwards wrote in part that:

"One of the "basic guidelines" recently reaffirmed by the Supreme Court in relation to the determination of a charge of obscenity is "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller* v. *California*, —— U.S. ——, —— (1973)....

"In this case the Municipal Auditorium Board of the City of Chattanooga has refused to rent the auditorium for the presentation of the play "Hair". A United States District Court has refused to grant relief from the board's decision on the ground that "Hair" is obscene. A panel of this court has affirmed the District Court, also holding that "Hair" is obscene. And the majority of our court has now rejected a motion to rehear the case in banc. All of this has been accomplished without any one of those participating in rejecting the play ever having seen it.[3] And at

[3] Judge McCree who did see the play dissented from the majority opinion characterizing it as obscene. (Footnote in opinion of Judge Edwards.)

no level has any board member or judge entered a finding that the play "lacks serious literary, artistic, political, or scientific value."

"While I would agree that at least some of the acts described so vividly in the opinions of the District Court . . . and of this court . . . could, if viewed separately, appropriately be labelled obscene under the present standards of the United States Supreme Court (see *Miller* v. *California, supra*. . . .) I do not agree that the play may be judged obscene, unless it is "taken as a whole" for purposes of that judgment. Thus far we have signally failed to do this. Taking words and sentences out of context, taking gestures employed in a play without reference to the rest of the play as has been done herein does not comply with the standard set out in *Miller, supra,* and *Roth, supra.*

"Over and above the first amendment violation described above the procedures employed to ban this play amounted to unconstitutional prior restraint on speech. . . . [citations omitted]

"Additionally the standards employed by the Municipal Auditorium Board in rejecting the application for rental at the theatre are clearly unconstitutionally vague.

"Unless the Supreme Court grants certiorari, this case will represent a final adjudication that the play "Hair" is obscene and subject to being banned under state obscenity laws in Michigan, Ohio, Kentucky and Tennessee — and this, we repeat, without any board member or judge so holding ever having seen the play. . . ."

Judge Weick wrote an opinion denying rehearing for himself and Judge O'Sullivan, and now took the ground that it was an appropriate exercise of judicial "discretion" to refuse equitable relief to an "obscene" play. (p. 70)

Reasons for Granting the Writ

This court has never addressed itself to the criteria for obscenity in the context of live theatre. The determination of obscenity below — made by judges none of whom had seen the play and in the teeth of record evidence that the play was a serious art work — rested upon criteria which, so far as we can see, are not supported by the decision of any court and are wholly inconsistent with first amendment principles. The issue presented is of great importance to American theatre, and it is one which only a few producers can afford the expense and long delay necessary to litigate all the way to this court.[4]

Moreover, the district court refused relief even though the municipal defendants did not even formally purport to apply *any* obscenity criteria in refusing to grant access to the play, but because it was not "clean, and healthful and culturally uplifting" — criteria which are wholly inconsistent with the standards laid down by this court. The case is, we think, on its face in conflict with the decisions of the *Fifth* and *Tenth Circuits*. And the whole history of the cases in this court on "prior restraint" make it plain that it is not proper to salvage an otherwise unconstitutional municipal licensing decision, as Judge Weick apparently believes, by an after-the-fact judicial determination that the speech involved (here the play) is, in fact, unprotected.

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[4] If the court permits the lower court decision to stand, it will, in effect, commit the general definition of obscenity in the context of live theatre to lower court determinations.

Point I. Defendants' Action Is Plainly Unconstitutional Because of a Lack of Constitutionally Acceptable Standards Governing Use of the Auditorium.

A. *No Acceptable Standards*

The courts below were fundamentally in error in viewing this as an obscenity case. This case is no different from those decided by the Fifth and Tenth Circuits in *Mobile, West Palm Beach* and *Oklahoma City, supra*. Here, as in those cases, access to the municipal theatre was refused under a municipal code wholly lacking in standards. Here, as in those cases, municipal officials claimed and *exercised* unfettered discretion over what plays would be permitted. Defendants' action is, therefore, invalid on its face. This case is squarely controlled by *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 151 n.3, and the long line of cases there cited. Under the constitution of the United States:

> "a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade, according to their own opinions regarding the potential effect of the activity in question on the 'welfare,' 'decency,' or 'morals' of the community." (*Id.* at 157)

See also *Cox* v. *Louisiana*, 379 U.S. 536, 557. Accordingly, "in numerous . . . cases, [the Supreme Court has] condemned broadly worded licensing ordinances which grant such standardless discretion to public officials that they are free to censor ideas and enforce their own personal preferences." *Grayned* v. *City of Rockford*, 408 U.S. 104, 113 n.22; *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 99-101.

The constitutional requirement of "narrow, objective and definite standards" is, quite plainly, not met here. Here, as in ***Mobile, West Palm Beach*** and ***Oklahoma City,***

there are no standards whatever by which to guide the discretion of the theatre officials. Section 2-238 of the Code of the City of Chattanooga, which controls use of the theatre, does not purport to prescribe any standards (Tr. Vol. p. 25; Vol. 2, pp. 14-15), and accordingly, the district judge rightly made no reference to it. The commissioner of utilities, grounds and buildings expressly testified that HAIR was denied access because, "in the best interest of the community," the city permitted only productions which are "clean and healthful and culturally uplifting." (Tr. Vol. 1, p. 26) Moreover, counsel for defendants repeatedly stressed the unfettered rights of defendants, stemming, he believed, from the "proprietary" character of these defendants' conduct. (Tr. Vol. 4, pp. 430-432, 434-439) In passing on the plaintiffs' application, defendants (a) did not see the play, (b) made no effort to apply obscenity criteria, and (c) *they never in fact considered whether HAIR was* obscene.[5] Their only judgment

[5] Defendants made no effort to apply obscenity criteria. *They had not seen the play when booking was refused* (Tr. Vol. 1, p. 27, Vol. 3, p. 235), *and they refused HAIR on very general grounds* (Tr. Vol. 2, pp. 161-162):

> "Mr. Conrad testified: It was brought to the attention of the Board. The Board, I mentioned—that a promoter was interested in bringing it here to Chattanooga. I don't remember the exact wording. I may have suggested something to the effect, 'Is there anyone who feels that it should be brought here?' There was no response and I talked by long distance telephone to the promoter and that was the last we heard from that particular promoter.
>
> • • •
>
> A formal vote was then taken not—to deny the booking. I believe the words used—the nudity was discussed briefly. *It was not an in depth discussion if I recall. The nudity was discussed briefly. The language was discussed briefly. It was determined that the booking would not be made in the best interest of the public.*
>
> Q. As a matter of fact, your obscenity defense was filed Friday the day before you went?
>
> I had no knowledge of what the defense was. I mean, I hadn't conferred with the attorneys, I didn't know."

was that it was not "in the best interest of the public." The cases cited show that this criterion is constitutionally insufficient.[6]

The judge in the district court and the court of appeals on rehearing apparently thought that these decisions were inapplicable and equitable relief should be denied, because exhibition of HAIR would violate Tennessee statutes and municipal ordinances relating to indecent exposure, lewdness, public nudity, and obscenity. (341 F. Supp. at 471) But nothing in the state statutes or in the auditorium code purports in any way to restrict the discretion of the municipal officials to questions of obscenity. "It matters not that the words appellee used might have been constitutionally prohibited under a narrowly and precisely drawn statute." *Gooding* v. *Wilson*, 405 U.S. 518, 520. Here the *articulated and applied* "standards" were constitutionally impermissible ones, such as "clean, healthful and culturally unlifting."

[6] Under *Shuttlesworth* and *Niemotko* v. *Maryland*, 340 U.S. 268, we think it doubtful that, where free speech interests are at stake, the auditorium manager can supply otherwise absent standards *ex post facto*. Here, as in *Shuttlesworth*, defendants *in fact* operated in a free-wheeling manner in accordance with the apparently open-ended discretion conferred upon them. Accordingly, their conduct was unconstitutional. (394 U.S. at 154-159) In any event, we know of no decision which would remotely sanction such an open-ended standard *even if it were an expressed part of the municipal code*. It has no more precision than "*family entertainment*," which the Fifth Circuit found wanting. *City of West Palm Beach, supra*. "Clean, healthful and culturally uplifting" entertainment is the equivalent of "the public welfare, peace, safety, health, decency, good order, morals or convenience," a standard invalidated in *Shuttlesworth*. It is also the equivalent of "prejudice to the best interests of the people of said City," a standard invalidated in *Gelling* v. *Texas*, 343 U.S. 960, and "moral, educational or amusing and harmless" which was condemned in *Superior Films, Inc.* v. *Department of Education*, 346 U.S. 587. For additional illustrations see *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 682-83. See also *Coates* v. *Cincinnati*, 402 U.S. 611, 614.

Moreover, the holding below wholly disregards *Shuttlesworth* and its progeny because it completely ignores the distinction there emphasized between prior restraint and subsequent punishment. It may very well be that exhibition of a movie or play could give rise to a subsequent prosecution under an obscenity statute. It does not follow, however, that *absent narrowly drawn standards* municipal licensing officials can impose restraint *prior* to exhibition. This settled distinction between prior restraint and subsequent punishment lies at the heart of the cases recognizing that an ordinance invalid on its face may be disregarded (see *Shuttlesworth, supra,* 394 U.S. at 151) and it was reaffirmed by the Court in *United States* v. *New York Times, Inc.*, 403 U.S. 711, and *Healy* v. *James,* 408 U.S. 169, 184. Accordingly, as the Fifth Circuit expressly recognized in *City of West Palm Beach,*[7] 457 F.2d at 1021, whether or not HAIR could be the subject of a criminal prosecution has no bearing on the validity of defendants' unlawful prior restraint on its exhibition. See also *Gooding* v. *Wilson,* 405 U.S. 518, 520-21. To assert, as does Judge Weick, that this unconstitutional conduct can be salvaged by a subsequent judicial determination that the particular speech involved is unprotected is not supported by a single decision of this court, and it is wholly at variance with sound first amendment considerations. At least since *Near* v. *Minnesota,* 283 U.S. 697, it is plain that plaintiffs need not prove the protected character of their speech as a condition precedent to invoking the rules laid down by this

[7] "Moreover, we hasten to add that the factual situation in the instant case is much more offensive in a constitutional sense than the circumstances in *Shuttlesworth*. There the petitioner was punished under the terms of an unconstitutional ordinance *after* exercising his right of free speech. In the instant case, the discretion of the defendant Boyes operated as a prior restraint upon the plaintiff's freedom of speech." (457 F.2d at 1021) (Emphasis in original.)

court governing prior restraint. Indeed, any such requirement would virtually rob those rules of any meaning.

B. *No Provision For Judicial Review.*

The district judge failed to recognize that defendants' refusal to permit HAIR access to the municipal auditorium was also invalid under *Freedman* v. *Maryland,* 380 U.S. 51, 58, where the Court recognized that only a procedure requiring a judicial determination suffices to impose a valid final restraint. And of critical importance here is the burden of seeking judicial review is on the city officials and a statute not so providing is void. (380 U.S. at 58-60) See also *Heller* v. *New York,* 413 U.S. ——, ——, n.5 and related text.

These decisions are controlling here. Here, as in *Freedman,* defendants pass upon the content of speech in order to determine whether it shall be permitted to exhibit; and here, as in *Freedman* defendants are acting under the provisions of municipal law which do not require that *they* seek judicial review. Accordingly, to that extent the city code, and defendants' action taken thereunder, is under *Freedman* void on its face.

Freedman is not inapplicable, as defendants contend, because HAIR might be shown in private theaters. *Freedman* is explicit recognition of the fact that "where First Amendment rights are involved — questions relating to the structure and timing of [judicial] remedies have been thought crucial to substantive constitutional policies". Hart & Wechsler, *The Federal Court and the Federal System* (2 ed.) 367, a point elsewhere discussed at length by one of counsel. Monaghan, *First Amendment "Due Process",* 83 Harv. L. Rev. 519, 524-26. Here the municipal licensing officials made a decision on grounds of a play's content; whether the result is a *final* bar to exhibition in

all available places in the municipality or only in some (municipal buildings) is irrelevant to the policies of *Freedman* — even if one were to overlook the obvious "in terrorem" effect of such a municipal decision on private theatre owners in small communities.

POINT II. THE COURTS ERRED IN CONCLUDING THAT "HAIR" WAS OBSCENE.

As the judge saw the matter, the heart of the case turned on whether HAIR was obscene. He empaneled an advisory jury and held an evidentiary hearing. The jury returned a verdict of obscenity (341 F. Supp. at 472). Not only did the jury not see the play, but the question of obscenity was submitted to it in an indiscriminate manner.[8]

It is unclear what weight the judge attached to the jury's verdict. That he could not lawfully attach to it any controlling significance is clear beyond doubt. A judge must make his own *independent determination* whether challenged material is protected by the constitution of the United States. E.g., *Miller* v. *California*, 93 S. Ct. 2607, 2615.[9] The judge recognized this fact; after reciting the findings of the jury he proceeded to make extensive findings of his own

[8] Obscenity cases, *Miller* v. *California*, 413 U.S. ——, present a series of discrete inquiries: whether the materials (a) appeal to prurient interests; (b) are patently offensive; (c) are without serious redeeming social value; and (d) whether there is any evidence of pandering. It is, surely, one thing to submit the question of contemporary local community standards to a jury, quite another to submit the question of social value. *United States* v. *A Motion Picture Entitled "I Am Curious Yellow,"* 404 F.2d 196, 199-200 (2 Cir. 1968). See Monaghan, *supra*, 83 Harv. L. Rev. at 530-31.

[9] This is part of the larger principle that where free speech claims are at stake the court must make its own independent determination. *New York Times* v. *Sullivan*, 376 U.S. 255, 284-85.

(341 F. Supp. at 472-74).[10] In finding HAIR obscene, however, we think it apparent that he committed reversible error in several separate respects.

A. *The Judge Erred In Ruling That HAIR Was Obscene Without Seeing The Play.*

In this case the judge ruled that the play was obscene without even viewing it and despite the fact that there was substantial evidence in the record of the play's protected character. This was plain error.

As defendants recognized (Tr. Vol. 2, p. 5; see *Blount* v. *Rizzi*, 400 U.S. 410, 417; *Healy* v. *James*, 408 U.S. 169, 184) the burden of proof is on those who would censor. And the cases are uniform in recognizing that a judge ought not lightly to disregard the evidence of nonobscenity. E.g., *Attorney General* v. *A Book Named "Naked Lunch"*, 351 Mass. 298, 299 (1966) ["although we are not bound by the opinions of others concerning the book, we cannot ignore the serious acceptance of it by so many persons in the literary community"]. *United States* v. *Klaw*, 350 F.2d 155, 170 ["It is the record and not our feelings that must control"]. Monaghan, *Obscenity 1966: The Marriage of Obscenity Per Se and Obscenity Per Quod*, 76 Yale L. J. 127, 150-151 and note 115. There was substantial record evidence demonstrating that HAIR is a serious art work

[10] We would observe, however, the judge's use of an advisory jury raises acute questions of practice so far as protection of free speech interests are concerned. Since the jury is necessarily a barometer of community values, it is by no means clear the jury will accord much protection to ideas which are unpopular with majority sentiment. Monaghan, *First Amendment "Due Process"*, supra 83 Harv. L. Rev. at 528-29. Accordingly, it is to judges —not juries— that the principal defense of free speech interests falls—a fact reflected in the requirement that the judge must make his own determination as to whether materials are constitutionally protected.

— to say nothing of the patently weak testimony that the play is obscene. Here the judge disregarded that evidence *without even seeing the play*, and without a finding that it was impractical to do so.[11] We know of no decision which would justify a judge in disregarding *favorable* record testimony to find *on the merits* against a serious theatrical work which has won substantial acclaim when the judge has not even viewed the play.[12] This is, after all, not a case where the judge disregards record evidence because the materials at issue are "hard core pornography [which] can and does speak for itself". *Paris Adult Theatre I* v. *Slaton*, 93 S. Ct. 2628, 2634 n.6; *Kaplan* v. *California*, 93 S. Ct. 2680, 2685 (semble). See also *United States* v. *12 200 Ft. Reels of Super 8MM Film*, 93 S. Ct. 2665, 2670 n.7.

[11] The alternatives which do least damage to the free speech interest must, of course, be utilized where reasonably available. E.g., *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 101 n.8 (collecting cases). If it were not practicable to see the play, a separate issue would, of course, be presented, but here there is no such showing of impracticability. (In *Southeastern Promotions, Ltd.* v. *Cervantes*, No. 26463-F, a state court judge in St. Louis flew to Kansas City to see a production of the play and after so doing ruled in its favor.) Indeed, the municipal officials flew to see the play immediately before trial.

[12] The necessity for viewing the play, at least absent the showing that such procedure is not practically available, is not obviated by the judge's footnote (341 F. Supp. at 474 n.4) that the play is "substantially modified from time to time and place to place". If that is so, it is difficult to comprehend what in this record supports *any* of the judge's findings since all the oral testimony was based on exhibition of the play elsewhere. Moreover, we are not told how HAIR "changes" in any way *material* to the issue before the judge. Surely, the fact that there is considerable "action" in the play does not mean that there is any material change in detail. Like any play, HAIR has an integrated theme and any changes from performance to performance, if they exist at all, are simply in its nuances. That the judge felt able to make findings about the "obscene conduct" in HAIR is a recognition of this fact. Finally, the judge's finding of "changes" is contrary to the *express stipulation between the parties*. (Tr. Vol. 2, pp. 12-13). Not surprisingly, neither the respondents nor the court of appeals made mention of this below.

B. *The Courts Below Applied An Incorrect Standard To Evaluate The Play.*

In finding HAIR obscene the judge recognized that he was reaching a result contrary to every other federal court which has considered the matter about a play which has shown in over 140 cities (Tr. Vol. 2, p. 12 *supra*), and which is one of the most successful and widely acclaimed theatre productions in modern times. The judge reached the conclusion he did because he fundamentally misunderstood the controlling constitutional standards. The judge made detailed findings concerning HAIR's "street language", but he recognized (341 F. Supp. at 475) that this was not decisive under the decisions of this court (*Cohen* v. *California*, 403 U.S. 15; *Gooding* v. *Wilson*, 405 U.S. 518), and here the language "considering [its] content and its placement", at the minimum, "bears some of the earmarks of an attempt at serious art". *Kois* v. *Wisconsin*, 408 U.S. 229, 231. Similarly, the judge recognized, as he must, that the brief nude scene was not the equivalent of obscenity. *City of Kenosha* v. *Bruno*, 412 U.S. 507, 515. The crucial part of the judge's ruling, silently approved by the court of appeals, follows:

> "Obscenity, however, as it relates to theatrical productions, can consist of either speech or conduct or a combination of the two. *It is clear to this Court that conduct, when not in the form of symbolic speech or so closely related to speech as to be illustrative thereof, is not speech and hence such conduct does not fall within the freedom of speech guarantee of the First Amendment.* These matters were dealt with by

the United States Supreme Court in the case of *United States* v. *O'Brien*, 391 U.S. 367. . . .

"*It is further clear to this Court that conduct not within the First Amendment is not subject to the requirement that the production in which it takes place be judged as a whole,* but rather that the conduct may be judged obscene or nonobscene on the basis of individual acts of conduct. It is abundantly clear that if a crime other than the crime of obscenity were committed upon the stage, the actor committing that crime could neither claim First Amendment protection nor could he require that he be judged criminal or noncriminal on the basis of the production as a whole. . . . *Accordingly, it must be that when the crime of obscenity is committed upon the live stage by conduct and not by speech,* or symbolic speech, no First Amendment protection attaches to that conduct *and no First Amendment requirement attaches that requires the production as a whole to be reviewed in determining such criminal obscenity.*

"This Court is aware that a district judge dealt differently with this issue in the case of *Southeastern Promotions, Ltd.* v. *City of Atlanta,* D.C., 334 F.Supp. 634 (1971) cited above. The Court there held that a stage production cannot be dissected into speech and nonspeech components. . . . It is a false and dangerous doctrine that the First Amendment forbids all regulation of conduct so long as that conduct masquerades under the guise of the theatrical. This Court respectfully declines to follow the rule set forth by the district judge in the *Atlanta* case. The same fallacy attaches to each of the cases relied upon by the plaintiff in prior adjudications of the theatrical production "Hair."

"When viewed in their component parts, it is perfectly clear that the actors and actresses in the theatrical production "Hair," by their conduct, and apart from any element of speech, commit repeated acts of criminal obscenity. . . . The Municipal Auditorium is a public place and the committing of live acts of simulated sexual intercourse, masturbation and mixed group nudity upon the stage before a live audience appeals to the prurient interest in sex, is patently offensive because it affronts contemporary community standards, both state and national, relating to the representation of sexual matters, and it is utterly without redeeming social value." (341 F. Supp. at 475-76) (Emphasis supplied.)

We recognize that states "have greater power to regulate nonverbal, physical conduct than to suppress descriptions of the same behavior." *Miller* v. *California,* 93 S. Ct. 2607, 2616 n.8. But each media of communication presents its own problems,[13] and the criteria used below would eliminate from live theatre virtually every sexually oriented scene no matter how presented and how central to the plot. By the criteria below many of the Greek classics (e.g., Lysistrata) could not be shown.

The judge's distinction is a complex one: first, the judge would artificially divide any play — a unitary presentation — into its constituent words and conduct; and secondly, he would further divide "conduct" into that which is "illustrative" of the speech and that which is not — the latter then being as wholly beyond the first amendment. Fundamentally, this approach is a total misapprehension of what live theatre is all about. And since sex is one of the most pervasive themes in all art, one can expect that a good part of theatre will, under his ruling,

[13] *Kingsley International Pictures Corp.* v. *Regents,* 360 U.S. 684, 689-90; *Kaplan* v. *California,* 83 S. Ct. 2680.

be beyond the protection of the first amendment — a result which, of course, would place live theatre productions in a category wholly different from the criteria applied to motion pictures. Certainly, if motion picture theatre productions are constitutionally entitled to the protection of obscenity standards, *Kaplan* v. *California*, 93 S. Ct. 2680, 2684, no sufficiently principled justification can be advanced for holding these standards *wholly inapplicable* to a live theatre performance *of the same matter*!

The root difficulty in the judge's opinion is his reliance upon an over-simplified distinction between "speech" and "conduct", an oversimplification which has been criticized by every commentator who has considered the subject.[14] More importantly, it finds absolutely no support in the decisions of this court. Those cases, of which *California* v. *LaRue*, 409 U.S. 109,[15] is only a recent example, recognize that every aspect of speech involves some integrally related conduct, which has necessarily been treated as a part of that speech.[16]

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[14] E.g., Henkin, *On Drawing Lines*, 82 Harv. L. Rev. 63, 80: "If it is intended as expression, if in fact it communicates, especially if it becomes a common comprehensible form of expression, it is speech." See also Alfange, *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 Sup. Ct. Rev. 1; *Symbolic Conduct*, 68 Col. L. Rev. 1091.

[15] See also *City of Kenosha* v. *Bruno*, *supra*, p. 17.

[16] Thus the *conduct* of wearing arm bands is protected, *Tinker* v. *Des Moines School District*, 393 U.S. 503. So too is the *conduct* of distributing leaflets protected by the first amendment. *Organization For A Better Austin* v. *Keefe*, 402 U.S. 415, 419. Similarly, picketing and demonstrations, while they involve speech "plus" conduct are entitled to considerable protection under the first amendment. *Amalgamated Food Employees Union* v. *Logan*, 391 U.S. 308; *Gregory* v. *Chicago*, 394 U.S. 111; and *Brown* v. *Louisiana*, 383 U.S. 131. In essence this is because it has always been understood that some conduct is an integral part of the speech itself, and the communication cannot exist without. The unworkability of any simple distinction between speech and conduct was recognized in numerous opinions of this Court during the last term. Thus in *Grayned* v. *Rockford*, 408 U.S. 104, and *Chicago Police Department* v. *Mosley*, 408 U.S. 92, the Court again recognized that picketing is within the protection of the first amendment, and both opinions referred to picketing as "expressive conduct". In *Kleindienst* v. *Mandel*, 408 U.S. 753, 764, the Court specifically rejected an attempt to resolve a first amendment issue in terms of an "action-speech" dichotomy saying "we cannot realistically say that the problem facing us disappears entirely or is nonexistent because the mode of regulation bears directly on physical movement." In *Healy* v. *James*, 407 U.S. 169, 181, the Court once more observed that "speech" includes more than "speaking" again recognizing that the right embraces freedom of association even though "the freedom of association is not explicitly set out ...." We would also invite the court's attention to *Wisconsin* v. *Yoder*, 406 U.S. 205, the Amish School case, where the Court refused to analyze a freedom of religion claim in terms of a distinction between beliefs and "conduct."

These decisions make plain that first amendment freedoms are not to be denied by artificially breaking up essentially unitary forms of communication. Each form of communication is to be treated for what it is, not artificially carved into "speech" and "something else". "Speech" in the constitutional sense includes a range of integrally related activities, such as leafleting, operating broadcasting facilities, associating for speech purposes, demonstrating, picketing, etc. These activities are *within* the ambit of free speech, and can be curtailed only if standard first amendment requirements are satisfied; namely, a narrowly drawn restriction designed to vindicate compelling governmental interests. That is the plain relevance of the foregoing cases, of *United States* v. *O'Brien*, on which the district judge relied, and of the obscenity decisions of this Court in the last term.

We think it apparent then that the judge's attempt to draw an artificial distinction between speech and conduct is wholly without support in either reason or authority. In live theatre—a form of communication which antedates the first amendment by thousands of years—there is an

inseparable union of words and action, which *together* have served as a vehicle for conveying ideas. This union has never been understood to be "mainly conduct and little speech." *Cohen* v. *California*, 403 U.S. 15, 27 (dissenting opinion). To the contrary, it has always had "a recognizable communicative aspect [which is] beyond dispute." *Cowgill* v. *California*, 396 U.S. 371 (memorandum of Harlan, J.). And, as Judge Edenfield observed, "The nonverbal elements in a theatrical production are the very ones which distinguish this form of art from literature." *Southeastern Productions, Ltd.* v. *Atlanta*, 334 F. Supp. 634, 639. That live theatre involves an inseparable union of words and action was clearly understood 2,300 years ago by Aristotle in his influential *Poetics*, see Book 1, Ch. 6, and a contrary view would certainly startle those involved with that art form. E.g. Shank, *The Art of Dramatic Art* (Delta 1969), particularly ch. 4; *The Theory of the Modern Stage*, E. Bentley, ed., (Pelican 1968).[17]

Not only is the artificial separation of HAIR into speech and conduct of the judge below inconsistent with both reason and authority, it is entirely unworkable. We are invited to divide a play not simply into speech and conduct, but conduct which is "illustrative of speech" and that which is not. The result which this mode of analysis produced shows its unworkable and unsatisfactory character. Without seeing the play, the judge found that the "conduct" in HAIR obscene because not "illustrative of the

[17] The judge was, therefore, plainly wrong. There is no doubt that the state has legitimate interest in regulating what occurs in the theatre. Murder is murder whether committed in a theatre. That is a necessary accommodation of the first amendment with other competing claims. Where, however, the state's only interest is in regulating sexual morality, then the accommodation is, as every other court has recognized, the satisfaction of obscenity criteria.

speech" because, he said, the simulated sexual conduct was "unrelated to" (p. 40) or "without reference to (p. 41) the *dialogue.*" (*Id.* at 474) That conclusion, incredible on its face and wholly without any acceptable basis in this record, is most revealing: the judge does not find that the simulated sexual conduct is not relevant to the *play*, simply to the *dialogle*. It seems apparent to us that the judge assumes that the play and the dialogue are one thereby missing the whole idea of what live theatre is all about.[18]

Moreover, even if the conduct were "unrelated" to the play, why was that conduct "obscene?" The fact that there is a brief nude scene at the end of the first act is certainly not enough, as the judge apparently recognized. The judge seemed rather to have focused on "simulated sexual conduct." (*Id.* at 474) Emphasis should be placed upon *simulated*. The judge does not find that there was any actual masturbation, sodomy or oral copulation; he finds simply that it was "simulated". One wonders how many plays could survive if simulated sexual activity is enough to withdraw protection of first amendment. The judge, of course, simply assumed that the standards of the street are applicable to the theatre. But a "reviewing court must, of necessity, look at the context of these materials, as well as their content." *Kois* v. *Wisconsin*, 408 U.S. 229, 231. And

> "'Acts which are unlawful in a different context, circumstances, or place, may be depicted or incorporated in a stage or screen presentation and come with-

[18] His view stands in sharp contrast to the recent decision in *Kois* v. *Wisconsin*, 408 U.S. 229, 231, where nude pictures in a newspaper were held protected "because they are relevant to the theme of the article."

in the protection of the First Amendment, losing that protection only if found to be obscene.' " (Id. at 830)

Barrows v. *Municipal Court*, 1 Cal. 3rd 821, 830. See also *P.B.I.C.* v. *Byrne, supra*, 313 F.Supp. at 764-65. This court's most recent pronouncement, *California* v. *LaRue*, 409 U.S. 109, 116-118, expressly recognizes that fact in holding that conduct in a public barroom is not to be equated with "conduct" occurring in a theatre. And surely *Barrows* is inconsistent with Judge O'Sullivan's assumption that HAIR's speech alone is obscene.

C. *HAIR Is Not Obscene.*

Defendants rightly recognized (Tr. Vol. 2, p. 5) that the burden of proof on obscenity rested with them. *Blount* v. *Rizzi*, 400 U.S. 410, 417; *Healy* v. *James*, 408 U.S. 169, 184. We need not discuss the evidence at considerable length because *on defendants' evidence alone*, the judge should have held that, as a matter of law, there was no sufficient showing that HAIR was obscene. It would unduly burden this petition to review the evidence at length. Suffice it to say that Defendants' evidence consisted of four witnesses. Typical is that Mr. William Trasher (Tr. Vol. 3, p. 164) a Chattanooga attorney. He had seen the play 1 1/2 years before and had walked out at the end of the first act. (Indeed, he was unsure as to how many acts the play had Tr. 172). He too readily admitted his lack of knowledge about the theatre: "I could tell you about baseball and football but I don't know much about the theatre" (*Id.* 189). His reason for leaving the theatre is simply stated at page 186. He was revolted by the "blasphemy and sacrilege" of the play, its "desecration of the American flag" and its "belittlement of the United States government" which means, of course, that he understood and rejected what he perceived to be HAIR's message.

Evidence of this slender nature, plus the script of the play itself, constituted the defendants' case on obscenity. It can hardly constitute a sufficient basis for concluding that a theater performance which has played in over 140 cities in the United States and has been widely acclaimed, can be suppressed *in Chattanooga*? All that is involved here is the testimony of witnesses who have not the slightest basis for giving "expert" opinion on the material issues. Moreover, each of defendants' witnesses grudgingly conceded that the play had a message. Not one of defendant's witnesses testified, or could testify, with respect to what are contemporary community standards (national or local) as to what is acceptable for live theatre.

It would reduce the first amendment to a nullity if defendants' testimony were adequate to support the finding that the play was obscene. All that is shown here is opposition to HAIR and what it stands for. But access to a municipal auditorium "may not be refused because it is not the type of entertainment which appeals to the auditorium board." *City of Mobile, supra*, 457 F.2d at 341. It is in fact, outrageous in the extreme to think that American citizens in New York, Los Angeles, Chicago, San Francisco, Seattle, Las Vegas, Boston, *Memphis and Nashville*, not to mention citizens in virtually every major capital of the Western world as well as Tokyo, Sydney, and Tel Aviv can see this important play but that these defendants can decide that the citizens in Chattanooga and its surrounding area cannot see it in a municipal auditorium. Plaintiff submits that the constitution of the United States prohibits such gross censorship; it prohibits this effort to reduce the residents of Chattanooga to the status of second class citizenship.

Wholly apart from the affirmative evidence in support

of HAIR,[19] therefore, it is plain that there is no acceptable basis for the judge's finding.

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[19] There was substantial evidence in the record that HAIR satisfied none, let alone all, of the elements which must be present if a finding of obscenity is to be substained.

Specifically:

1. *Appeal to Prurient Interest.*

The dominant theme of HAIR, taken as a whole, does not appeal to a prurient sexual interest. The "dominant theme" of HAIR is not sex, nudity, or anything of that nature. HAIR is concerned with the world of the alienated young—with Vietnam, drugs, love, etc. (Tr. Vol. 3, pp. 282-98; id. at 311; id. at 321-23, the nude scene is plainly not designed to "appeal to a shameful or morbid interest in nudity, sex. etc." *Roth* v. *United States*, 354 U.S. 476, 478 n.20; *Cohen* v. *California*, 403 U.S. 15, 20. Its purpose is symbolic, not erotic. (Tr. Vol. 3, p. 321.)

2. *Patent Offensiveness.*

HAIR is not "patently offensive"; it does not "affront contemporary community standards relating to the description or representation of sexual matters in the live theatre." (Tr. Vol. 3, p. 3423) The use of four letter words can hardly be thought to deprive the speech of its protected character, as the judge recognized. See p. 17, *supra*. (See Tr. Vol. 3, p. 325) Moreover, these very words are used in the phonograph album which has sold almost countless copies in every city and town throughout this country. In addition, HAIR has been playing in innumerable other American and 14 foreign cities, a fact not to be ignored in determining whether it is patently offensive for what is appropriate live theatre.

3. *Social Value.*

Defendants could not rationally allege that HAIR is "without serious redeeming social value". *Miller* v. *California*, 93 S. Ct. 26-7, 2616. The widespread critical acclaim received by HAIR throughout the country demonstrates that it has redeeming social value. In *Southwest Productions, Inc.* v. *Freeman*, (D. Ark. 1970 unreported) at page 7, Judge Eisel characterized the matter as follows:

> "The principal characters in the production are definitely not the 'straight' world. Rather they are a collection of the disenchanted, the dropouts from conventional society: the young, the poor and the black, experimenting with new life styles, and yet still trying to confront established society on what they believe to be the 'real' issues: war, poverty, racism and the hypocrisy of their elders. Their language is from the street and of their generation. Whether what is said has any merit or validity or, indeed, whether it is said well is irrelevant for our purposes. That the play, taken as a whole, does make statements relating to important social, moral and political issues is, however most relevant under the tests mandated by the decisions of our courts."

There was ample testimony in this record to support Judge Eisel's conclusion. (Tr. Vol. 3, pp. 282-98; 321-23; 342, 348-5) Even the defense witness conceded this fact.

Conclusion

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES DISTRICT COURT,
E.D. TENNESSEE, S.D.

Civ. A. No. 6379.

SOUTHEASTERN PROMOTIONS, INC.
v.
STEVE CONRAD et al.

April 7, 1972.

John Alley and Michael M. Raulston, Chattanooga, Tenn., for plaintiff.

Eugene Collins and Randall L. Nelson, Chattanooga, Tenn., for defendants.

MEMORANDUM

FRANK W. WILSON, Chief Judge.

The plaintiff, Southeastern Promotions, Inc., seeks by this action to obtain a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 regarding the plaintiff's right to lease a municipal theater or auditorium for use in presenting a commercial theatrical production known as "Hair." Jurisdiction is averred to be based upon 28 U.S.C. §§ 1332 and 1343(3) (4). The plaintiff seeks by way of relief a mandatory injunction requiring the defendants, as members of the Municipal Auditorium Board for the City of Chattanooga, Tennessee, to lease the theater or auditorium under its management to plaintiff for a specific date, the specific date now sought being Sunday, April 9, 1972, four days from the date upon which the trial in the case was concluded.

By way of response the defendants filed a motion seeking a dismissal of the complaint upon the grounds that (1) the

plaintiff was without standing to maintain the lawsuit, (2) the defendants, acting in a proprietary rather than governmental capacity, cannot be required to lease the theater facility under their management, (3) the theatrical production sought to be presented by the plaintiff would violate both the ordinances of the City of Chattanooga and the laws of the State of Tennessee and would be in violation of Paragraph (1) of the standard lease requiring compliance with such laws (Exhibit No. 3), (4) the plaintiff, being a corporation and not a natural person, would have no right to maintain this action, and (5) the complaint fails to allege a cause of action.

In order to expedite the hearing of this case, action on the motion to dismiss was reserved and the defendants were ordered to file an answer. In their answer, and among other matters, the defendants contended that the theatrical production "Hair" was a violation of municipal ordinances and state laws prohibiting nudity and obscenity in public places. A trial was held upon all issues, with the issue of obscenity being tried to an advisory jury pursuant to Rule 39 (c), Federal Rules of Civil Procedure. The jury returned a verdict finding the theatrical production "Hair" obscene within the meaning of obscenity as that term relates to freedom of speech as secured by the First Amendment and further found conduct on the part of actors apart from any speech or conduct in expression of speech (symbolic speech) to be obscene conduct.

The case is now before the Court for decision of all issues raised in the plaintiff's complaint, the defendants' motion to dismiss, the defendants' answer, the record made upon the trial of the case, the advisory verdict of the jury, and the argument of counsel. By order of the Court and without objection of the parties, the trial of this case was held shortly after the filing of the answer and this memorandum is being written immediately upon the conclusion

of the trial and under the necessity of its immediate entry if the plaintiff is to have the requested date of showing four days from this date. This opinion will serve as the Court's findings of fact and conclusions of law.

The plaintiff, Southeastern Promotions, Inc., is a corporation organized under the laws of the State of New York and with its principal offices in New York City. It is engaged in the business of presenting commercial theatrical productions and has contractual relations giving its presentation rights with the theatrical group that owns and produces a theatrical production known as "Hair" and described as a "rock musical." The defendants are the duly appointed and acting members of a municipally created body known as the Board of Directors of the Memorial Auditorium. They were appointed pursuant to an ordinance of the City of Chattanooga, Tennessee, and are charged with the management and operation of the Memorial Auditorium, a municipally owned auditorium, and the Tivoli Theater, a former motion picture theater privately owned and now under lease to the City of Chattanooga.

The plaintiff has made three previous requests of the defendants for lease of the Tivoli Theater but upon each occasion the request was denied. Following the last denial this lawsuit was filed upon November 1, 1971. A hearing upon a preliminary injunction in advance of any response by the defendants was held at that time and the injunction denied. By amendment to its complaint filed March 23, 1972, the plaintiff now seeks a mandatory injunction permitting it to lease the municipal auditorium for the presenting of its theatrical production "Hair" upon the date of Sunday, April 9, 1972. No issue exists in the case but that the municipal auditorium is not scheduled for other use on that date or that he plaintiff cannot meet the conditions of the standard lease form regularly used by the defendants in leasing of that municipal auditorium

other than that condition of the lease relating to compliance with the laws of the State of Tennessee and of the City of Chattanooga.

Motion to Dismiss

Turning first to the defendants' motion to dismiss, as previously stated, that motion is predicated upon a denial of standing on the part of the plaintiff corporation to maintain this action, a denial of any duty upon the defendants while acting in a proprietary capacity to lease the municipal facilities under its management, an averment of the plaintiff's inability to comply with the lease requirement that local and state law will not be violated, an averment that the plaintiff, being a corporation and not a natural person, would have no right to maintain this action, and a general averment that the complaint fails to aver any substantial federal question or constitutional issue.

[1] With regard to the plaintiff's standing to maintain this litigation, it is the defendants' contention that the plaintiff does not propose to make any expression or theatrical presentation itself, but rather is only a booking agent having at most only a commercial interest in the presentation of "Hair." It is contended that no right of the plaintiff to freedom of speech is involved. Citing the rule that only those whose federal constitutional rights are alleged to be involved have standing to seek judicial adjudication of those rights, the defendants deny any standing in the plaintiff to assert a First Amendment violation in this lawsuit. While the undisputed evidence now bears out that the plaintiff's interest in the lawsuit is a commercial one as booking agent and promoter, and not as an owner or performer, the testimony being that it expects to net $10,000 off of a single performance in Chattanooga, the issue of standing to sue would appear to be resolved in favor of the plaintiff by the United States Supreme Court in the case of *Flast* v. *Cohen*, 392 U.S. 83,

88 S.Ct. 1942, 20 L.Ed.2d 947 (1968) wherein the Court stated:

> "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions' (citation omitted)."

As stated elsewhere in that opinion, "The question of standing (i.e., in terms of constitutional limitation) is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in form historically viewed as capable of judicial resolution." When viewed in light of these principles, it is apparent that the defendants' motion to dismiss for lack of standing on the part of the plaintiff to maintain this action must be denied.

[2] It is next contended that although the defendant Board is a municipally created board with responsibility for management of municipally owned or leased theater and auditorium facilities, the Board's activities in this regard are of a proprietary and not of a governmental nature. It is therefore contended that leasing or not leasing these facilities is entirely optional with the Board, as would be true with a private owner. The defendants cite the following authorities in support of this proposition: *Avins* v. *Rutgers State University of New Jersey*, 3 Cir., 385 F.2d 151 (1967); *Warren* v. *Bradley*, 39 Tenn.App. 451, 284 S.W.2d 698 (1955); *City of Knoxville* v. *Heth*, 186 Tenn. 321, 210 S.W.2d 326; *Miami Beach Airline Service* v. *Crandon*, 159 Fla. 504, 32 So.2d 153; *State ex rel.* v. *Newton*, 3 Tenn.Civ.App. 93 (1912); *State of Washington ex rel. Tubbs* v. *City of Spokane*, 53 Wash.2d 35, 330 P.2d 718 (1958); *State of Ohio ex rel. White* v. *City of Cleveland*, 125 Ohio St. 230, 181 N.E. 24, 86 A.L.R. 1172; 56 Am.Jur. 2d "Municipal Corporations" § 556; and *Southeastern Promotions, Ltd.* v. *City of Oklahoma*, (Civil Action No. 72-105, D.C.W.D.Okl., Decided March 27, 1972). Generally speaking, the foregoing line of cases deals with the distinction between proprietary and governmental action and reason by analogy that proprietary action by a governmental body is to be judged by the same rules governing private proprietary action. While this line of reasoning by analogy may appear on the surface to have validity, the analogy breaks down under more careful examination. It would appear that the defendant Board in this case does act in a proprietary capacity in its management of its theater and auditorium facilities. However, whether the Board is acting in a proprietary capacity or in a governmental capacity, it is apparent that it remains a public body. It is further apparent that as a public body it could not allow men to use the auditorium but refuse under like circumstances to permit women to use it solely because they were women. It is apparent that the defendant Board could not permit persons of one religious persuasion to use the auditorium but under like circumstances refuse to permit those of another religious persuasion to use it solely because they were of another religious persuasion. The same would be true if the Board sought to discriminate upon the basis of race or national origin. Accordingly, it is apparent that whether the Board acts in a governmental capacity or in a proprietary capacity, it nevertheless remains a public body, and as such it cannot differentiate or discriminate where the sole basis of that differentiation or discrimination is for some constitutionally impermissible reason. This is tacitly recognized even in the defendants' last cited case above, the recent and unreported decision of *Soulheastern Promotions, Ltd.* v. *City of Oklahoma, supra*, wherein the Court stated, "It follows that the first part of numbered paragraph 8 of the lease contract govern-

ing the use of the Civic Music Center Hall is valid in that defendants are within their rights to decline to contract with exhibitors so long as they do not act arbitrarily."

While the Auditorium Board may lawfully deny use of its facilities unto all persons, or unto all persons for certain reasonably distinguishable types of activity, it cannot permit its use for a purpose to one person and deny its use for the same purpose to another person solely for a constitutionally impermissible reason, as for example to deny the latter person his right to freedom of speech. By way of illustration, if obscenity were the only reason advanced by the Board for denying use of its facilities and that contention of obscenity is not sustainable in fact and in law, the denial then becomes one for the constitutionally impermissible reason of denial of freedom of speech and the denial of a lease under such circumstances cannot stand.

[3] The third ground in the defendants' motion to dismiss, namely that the theatrical production for which a lease is sought by the plaintiff would violate both ordinances of the City of Chattanooga and laws of the State of Tennessee relating ot both public nudity and obscenity, raises issues of both fact and law which can only be decided after a trial on the merits of these contentions. These matters will accordingly be considered in the portion of this opinion dealing with the trial of the case on its merits.

[4] The fourth ground in the defendants' motion to dismiss is the allegation that the plaintiff, being a corporation, cannot maintain this action. In support of this ground the defendants rely upon the case of *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496, 59 S. Ct. 954, 83 L.Ed. 1423, wherein the Court stated:

> "Natural persons, and they alone, are entitled to the privileges and immunities which Section 1 of the Fourteenth Amendment secures for 'citizens of the United States.' Only the individual respondents may, therefore, maintain this suit."

The holding in the foregoing case is inapplicable to the allegations in this case for the reason that the constitutional rights here claimed are due process, equal protection of the laws, and freedom of speech, and do not arise under the privileges and immunities clause. Corporations are considered persons within the provisions of the constitutional guarantees of due process, equal protection and freedom of speech. See *Grosjean* v. *American Press Company*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660. The fourth ground of the motion to dismiss will likewise be denied.

[5] The fifth and final ground in the defendants' motion to dismiss is that the complaint fails to allege a federal question issue in that the defendants have not denied the plaintiff's right to speak, but at most have only denied the use of a particular forum in which to speak. It is apparent that this contention is without merit if in fact, as alleged by the plaintiff, the defendants have acted so as to deny the plaintiff equal protection of the laws, due process and freedom of speech.

Trial on the Merits

Turning to the merits of this lawsuit, the pleadings raise essentially the issue of whether the defendant Board acted within its lawful discretion in declining to lease its theater and/or auditorium facility to the plaintiff for the reason that the plaintiff's theatrical production "Hair" would violate Paragraph (1) of the standard lease form requiring the lessee to comply with all state and local laws in its use of the leased premises. More specifically, the issue presented by the pleadings is whether the theatrical production "Hair" would violate any constitutionally valid provision of the common law of Tennessee relating to indecent exposure, gross indecency, or lewdness or would violate any constitutionally valid provision of City ordinances and

State statutes which, among other matters, purport to make public nudity and obscene acts criminal offenses.[1]

[1] *Chattanooga Code*

Sec. 25-28. *Indecent exposure and conduct.* It shall be unlawful for any person in the city to appear in a public place in a state of nudity, or to bathe in such state in the daytime in the river or any bayou or stream within the city within sight of any street or occupied premises; or to appear in public in an indecent or lewd dress, or to do any lewd, obscene or indecent act in any public place.

Sec. 6-4. *Offensive, indecent entertainment.* It shall be unlawful for any person to hold, conduct or carry on, or to cause or permit to be held, conducted or carried on any motion picture exhibition or entertainment of any sort which is offensive to decency, or which is of an obscene, indecent or immoral nature, or so suggestive as to be offensive to the moral sense, or which is calculated to incite crime or riot.

Tennessee Code Annotated

Sec. 39-3008. — It shall be a misdemeanor for any person to knowingly sell, distribute, display, exhibit, possess with the intent to sell, distribute, display or exhibit; or to publish, produce, or otherwise create with the intent to sell, distribute, display or exhibit any obscene material . . .

* * * * *

The word "person" as used in this section shall include the singular and the plural and shall also mean and include any person, firm, corporation, partnership, co-partnership, association, or any other organization of any character whastoever.

Sec. 39-1013. *Sale or loan of material to minor — Indecent exhibits.* It shall be unlawful:

(a) for any person knowingly to sell or loan for monetary consideration or otherwise exhibit or make available to a minor;
  (1) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person, or portion of the human body, which depicts nudity, sexual conduct, excess violence, or sado-masochistic abuse, and which is harmful to minors;
  (2) any book, pamphlet, magazine, printed matter, however reproduced, or sound recording, which contains any matter enumerated in paragraph (1) hereof above, or which contains explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, excess violence, or sado-masochistic abuse, and which is harmful to minors;

(b) for any person knowingly to exhibit to a minor for a monetary consideration, or knowingly to sell to a minor an admission ticket or pass or otherwise to admit a minor to premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct, excess violence, or sado-masochistic abuse, and which is harmful to minors.

This case, involving as it does the First Amendment right to freedom of speech, and the statutes and ordinances cited in the footnote asserting obscenity as a prohibited criminal offense, the issue of obscenity was severed for trial from other issues in the case and this issue was tried before the Court sitting with an advisory jury pursuant to Rule 39(c), F.R.C.P. The evidence upon the trial of the obscenity issue consisted of the full script and libretto with production notes and stage instructions (Exhibit No. 4), a recording of the sound tract of all musical numbers in the production (Exhibit No. 7), and a souvenir program (Exhibit No. 1). In addition there was received the testimony of seven witnesses who had witnessed the production "Hair," including two witnesses who attended a performance two days previous to their testimony, and an eighth witness who had not seen the production but had read the script and gave his interpretation as a drama critic. Following the completion of the evidence and the argument of counsel, the issue of obscenity was submitted to the jury upon instructions of the Court upon the issue of obscenity, as set forth in an appendix to this opinion.

After deliberation the jury returned the following verdict:

> (1) We, the jury find the theatrical production "Hair" to be *obscene* in accordance with the definition of obscene as it relates to freedom of speech under the First Amendment of the United States Constitution.
>
> (2) We, the jury, find the theatrical production "Hair" to be *obscene* in accordance with the definition of obscenity as it relates to conduct.

After discharge of the jury further evidence was received

by the Court upon issues other than obscenity, such evidence being principally with regard to the action of the Board in denying a lease of its facilities to the plaintiff and the standard form of lease required to be executed by all lessees (Exhibit No. 3). Following further argument of counsel the case was submitted to the Court upon the foregoing record.

Findings of Fact

Turning first to the issue of obscenity, the script, libretto, stage instructions, musical renditions, and the testimony of the witnesses reflect the following relevant matters (It should be noted that the script, libretto, and stage instructions do not include but a small portion of the conduct hereinafter described as occurring in the play):

The souvenir program as formerly distributed in the lobby (Exhibit No. 1) identified the performers by picture and biographical information, one female performer identifying herself as follows:

> "Hobbies are picking my nose, fucking, smoking dope, astro projection. All that I am or ever hope to be, I owe to my mother."

It was testified that distribution of this program had now been discontinued. Prior to the opening of the play, and to the accompaniment of music appropriate to the occasion, a "tribe" of New York "street people" start gathering for the commencement of the performance. In view of the audience the performers station themselves in various places, some mingling with the audience, with a female performer taking a seated position on center stage with her legs spread wide to expose to the audience her genital area, which is covered with the design of a cherry. Thus the stage is set for all that follows. The performance then begins to the words and music of the song "Aquarius," the melody of which, if not the words, have become nationally, if not internationally, popular, according to the

evidence. The theme of the song is the coming of a new age, the age of love, the age of "Aquarius." Following this one of the street people, Burger, introduces himself by various prefixes to his name, including "Up Your Burger," accompanied by an anal finger gesture and "Pittsburger," accompanied by an underarm gesture. He then removes his pants and dressed only in jockey shorts identifies his genitals by the line, "What is this God-damned thing? 3,000 pounds of Navajo jewelry? Ha! Ha! Ha!" Throwing his pants into the audience he then proceeds to mingle with the audience and, selecting a female viewer, exclaims, "I'll bet you're scared shitless."

Burger then sings a song, "Looking For My Donna," and the tribe chants a list of drugs beginning with "hashish" and ending with "Methadrine, Sex, You, WOW!" (Exhibit No. 4, p. 1-5) Another male character then sings the lyric:

> "SODOMY, FELLATIO, CUNNILINGUS, PEDERASTY — FATHER, WHY DO THESE WORDS SOUND SO NASTY? MASTURBATION CAN BE FUN. JOIN THE HOLY ORGY, KAMA SUTRA, EVERYONE." (Exhibit No. 4, p. 1-5)

The play then continues with action, songs, chants, and dialogue making reference by isolated words, broken sentences, rhyme, and rapid changes to such diverse subjects as love, peace, freedom, war, racism, air pollution, parents, the draft, hair, the flag, drugs, and sex. The story line gradually centers upon the character Claude and his response and the response of the tribe to his having received a draft notice. When others suggest he burn his draft card, he can only bring himself to urinate upon it. The first act ends when all performers, male and female, appear nude upon the stage, the nude scene being had without dialogue and without reference to dialogue. It is also without mention in the script. Actors simulating police

then appear in the audience and announce that they are under arrest for watching this "lewd, obscene show."

The second act continues with song and dialogue to develop the story of Claude's draft status, with reference interspersed to such diverse topics as interracial love, a drug "trip," impersonation of various figures from American history,[2] religion, war, and sex. The play ends with Claude's death as a result of the draft and the street people singing the song, "Let the Sunshine In," a song the testimony reflects has likewise become popular over the Nation.

Interspersed throughout the play, as reflected in the script, is such "street language" as "ass" (Exhibit No. 4, pp. 1-20, 21 and 2-16), "fart" (Exhibit No. 4, p. 1-26), and repeated use of the words "fuck"[3] and the four letter word for excretion (Exhibit No. 4, pp. 1-7, 9 and 41). In addition, similar language and posters containing such language were used on stage but not reflected in the script.

Also, throughout the play, and not reflected in the script, are repeated acts of simulated sexual intercourse. These were testified to by every witness who had seen the play. They are often unrelated to any dialogue and accordingly

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[2] Lincoln is regaled with the following lyrics: "I's free now thanks to you, Massa Lincoln, emancipator of the slave, yeah, yeah, yeah! Emanci—mother fucking—pater of the slave, yeah, yeah, yeah! Emanci—mother fucking—pater of the slave, yeah, yeah, yeah!" With Lincoln responding, "Bang my ass . . . I ain't dying for no white man!"

[3] A woman taking her departure says to the tribe, "Fuck off, kids." (Exhibit No. 4, p. 1-35). The following dialogue occurs as Claude nears his death scene:

"Burger: I hate the fucking world, don't you?
"Claude: I hate the fucking world, I hate the fucking winter, I hate these fucking streets.
"Burger: I wish the fuck it would snow at least.
"Claude: Yeah, I wish the fuck it would snow at least.
"Burger: Yeah, I wish the fuck it would.
"Claude: Oh, fuck!
"Burger: Oh, fucky, fuck, fuck!" (Exhibit No. 4, p. 2-22)

could not be placed with accuracy in the script. The overwhelming evidence reflects that simulated acts of anal intercourse, frontal intercourse, heterosexual intercourse, homosexual intercourse, and group intercourse are committed throughout the play, often without reference to any dialogue, song, or story line in the play. Such acts are committed both standing up and lying down, accompanied by all the bodily movements included in such acts, all the while the actors and actresses are in close bodily contact. At one point the character Burger performs a full and complete simulation of masturbation while using a red microphone placed in his crotch to simulate his genitals. The evidence again reflects that this is unrelated to any dialogue then occurring in the play. The evidence further reflects that repeated acts of taking hold of other actors' genitals occur, again without reference to the dialogue. While three female actresses sing a song regarding interracial love, three male actors lie on the floor immediately below them repeatedly thrusting their genitals at the singers. At another point in the script (Exhibit No. 4, p. 2-22) the actor Claude pretends to have lost his penis. The action accompanying this line is to search for it in the mouths of other actors and actresses.

In support of the non-obscenity of the play "Hair" the plaintiff relies upon the contention that the simulated sexual acts consume only a small portion of the total performance time, that the nudity scene is brief and in reduced lighting, that the audience by attending consents to the play, that the play has been a financial success second only to the musical "Oklahoma," that the play has been performed in over 140 cities, that the music from the play has been upon the "Hit Parade," and that four other courts have found the play not to be obscene. *Southeastern Promotions, Ltd.* v. *City of Atlanta,* D.C., 334 F.Supp. 634 (1971); *Southeastern Promotions, Ltd.* v. *City of Charlotte,*

D.C., 333 F.Supp. 345 (1971); *P. B. I. C., Inc.* v. *Byrne*, D.C., 313 F.Supp. 757 (1970); and *Southwest Productions, Inc.* v. *Freeman*, (U.S.D.C. E.D.Ark., 1971).[4]

Obscenity

[6] The definition of legal obscenity as it relates to the First Amendment guarantee of freedom of speech is defined in the case of *Roth* v. *United States* (1957) 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, *reh. den.*, 355 U.S. 852, 78 S.Ct. 8, 2 L.Ed.2d 60. The definition of obscenity in *Roth* is further amplified in *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639. Although there have been numerous intervening cases in the Supreme Court dealing with obscenity, the *Roth* test of obscenity has been reaffirmed as recently as the case of *Rabe* v. *Washington*, 405 U.S. 313, 92 S.Ct. 993, 31 L.Ed.2d 258 (Decided March 20, 1972). Having set forth that definition in the Court's charge to the jury as set forth in the appendix to this opinion, the Court will here include only a summary statement of the rule as taken from the charge.

> "Thus, by way of summing up, before the theatrical production here in issue can be found to be legally obscene, these elements must coalesce; It must be established, first, that the dominant theme of the material taken as a whole appeals to a prurient interest in sex; and, second, that the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and, third, that the material is utterly without redeeming social value."

[4] This Court has no knowledge of the facts before the courts in any of the cited cases, for they make little in the way of findings of fact. Furthermore, it is apparent from the evidence in this case that the manner of presentation of "Hair" is substantially modified from time to time and place to place. The version of the play upon which the findings of fact have been made by this Court was that presented two days before the trial and five days before the writing of this opinion.

Suffice it to say that the United States Supreme Court, unlike the English courts, does not permit the judging of a theatrical production in relevant portions in determining obscenity for the purposes of determining First Amendment freedom of speech rights. Rather, it is required that the production be judged as a whole and that it be granted First Amendment protection unless, among other matters, the production, when judged as a whole, is "utterly without redeeming social value." The latter concept has been interpreted with great strictness by the Supreme Court, with strong emphasis being placed upon the word "utterly." Furthermore, the Supreme Court has recently granted First Amendment protection to vulgar words similar to those here used. *Cohen* v. *California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). Even apart from this, this Court could readily find, as did the jury, that substantial portions of the plaintiff's production is "utterly without redeeming social value." When required to view the production as a whole, however, including the music and those portions of the play that are not obscene, but at most only controversial, the Court cannot state that as a whole it is "utterly" without redeeming social value.

[7] Obscenity, however, as it relates to theatrical productions, can consist of either speech or conduct or a combination of the two. It is clear to this Court that conduct, when not in the form of symbolic speech or so closely related to speech as to be illustrative thereof, is not speech and hence such conduct does not fall within the freedom of speech guarantee of the First Amendment. These matters were dealt with by the United States Supreme Court in the case of *United States* v. *O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). That case arose out of the burning of draft cards at an anti-war demonstration. The issue presented was whether a federal statute making the knowing destruction or mutilation of a draft card a

crime was an unconstitutional infringement upon the accused's right of freedom of speech. The Court, in upholding the statute from constitutional attack, stated:

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest..."

[8, 9] It is further clear to this Court that conduct not within the First Amendment is not subject to the requirement that the production in which it takes place be judged as a whole, but rather that the conduct may be judged obscene or nonobscene on the basis of individual acts of conduct. It is abundantly clear that if a crime other than

the crime of obscenity were committed upon the stage, the actor committing that crime could neither claim First Amendment protection nor could he require that he be judged criminal or noncriminal on the basis of the production as a whole. If a murder, rape, mayhem or crime of assault were committed upon the stage, the actor perpetrating the same could claim no First Amendment protection, nor could he require that the theatrical production as a whole be reviewed in determining the criminality of his conduct. Accordingly, it must be that when the crime of obscenity is committed upon the live stage by conduct and not by speech, or symbolic speech, no First Amendment protection attaches to that conduct and no First Amendment requirement attaches that requires the production as a whole to be reviewed in determining such criminal obscenity.

This Court is aware that a district judge dealt differently with this issue in the case of *Southeastern Promotions, Ltd.* v. *City of Atlanta*, D.C., 334 F.Supp. 634 (1971) cited above. The Court there held that a stage production cannot be disected into speech and nonspeech components. The fallacy of that position is readily apparent, however, if any crime other than the crime of obscenity were committed in the course of a live stage production. That Court would doubtless have no difficulty in dissecting speech and nonspeech components if the crime committed on the stage were the crime of rape or homicide, even though called for in the script. It is a false and dangerous doctrine that the First Amendment forbids all regulation of conduct so long as that conduct masquerades under the guise of the theatrical. This Court respectfully declines to follow the rule set forth by the district judge in the *Atlanta* case. The same fallacy attaches to each of the cases relied upon by the plaintiff in prior adjudications of the theatrical production "Hair."

[10] When viewed in their component parts, it is perfectly clear that the actors and actresses in the theatrical production "Hair," by their conduct, and apart from any element of speech, commit repeated acts of criminal obscenity that would be in violation of the ordinances of the City of Chattanooga and the statutes of the State of Tennessee forbidding acts of obscenity in public places. The Municipal Auditorium is a public place and the committing of live acts of simulated sexual intercourse, masturbation and mixed group nudity upon the stage before a live audience appeals to the prurient interest in sex, is patently offensive because it affronts contemporary community standards, both state and national, relating to the representation of sexual matters, and it is utterly without redeeming social value.

[11] As regards the plaintiff's contention that the relative brevity of the sexual conduct in proportion to the total time of the play and the reduction of lighting on the scene of mixed group nudity relieves the conduct of its obscene character, these matters obviously constitute no defense to a charge of obscene conduct. These matters, on on the contrary, are but proof of the plaintiff's own awareness of the obscenity of the conduct, as further evidenced by the use of an actor policeman to announce to the audience at the conclusion of the first act that they are under arrest for watching this "lewd, obscene show." Instantaneous murder is no less a crime than slow poisoning. A dimly visible robbery is no less a crime than a well lighted one. Unlawful conduct is not rendered lawful by the wattage of the light bulb in which it is committed. Nor is it any defense that the acts other than nudity were simulated acts of sexual conduct. Simulated sexual acts are in themselves sexual conduct. Pregnancy does not have to result to establish sexual conduct.

[12] Likewise without merit is the plaintiff's contention that its performance is protected from regulation in that it is performed before a consenting audience. If audience consent were the test of First Amendment protection, then cock fights, bull fights, and Roman gladiatorial contests could no longer be regulated or forbidden by law.

As regards the constitutional validity of the ordinances and statutes relied upon by the defendants, insofar as those ordinances and statutes make obscenity as hereinabove defined a crime, there can be no doubt of their validity. As stated in *Berman* v. *Parker,* 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954):

> "Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it."

[13] Undisciplined sex is one of the most destructive forces in any society and has historically been so recognized. It is destructive of many human values and institutions, not the least of which is the family, which in turn has served as the foundation for every civilization yet known to man. Regulation of public and undisciplined sexual conduct is clearly within the police power of the state.

[14] It is likewise equally clear that the obscenity laws relied upon by the defendants, as they relate to obscene conduct, meet the other standards laid down in *United States* v. *O'Brien, supra.* They further an important or substantial governmental interest, that is the suppression of public and undisciplined sexual conduct, and the protection of public morality and welfare. Their purpose is unrelated to the suppression of free speech, or, at most, they impinge upon the First Amendment freedom no more than is essential to the furtherance of that governmental interest.

[15, 16] As regards the ordinance forbidding nudity in public places, that, too, can meet the standards for the exercise of police power as laid down in *United States* v. *O'Brien, supra,* particularly when applied to mixed group nudity upon the live stage, as occurs in the theatrical production here involved. Mixed group public nudity may become the accepted community standard in this Nation. But if it does, it should be by legislative approval, not by judicial fiat in the face of legislative action to the contrary.

[17] This Court is accordingly of the opinion that the theatrical production "Hair" contains conduct, apart from speech or symbolic speech, which would render it in violation of both the public nudity ordinances of the City of Chattanooga and the obscenity ordinances and statutes of the State of Tennessee. The defendants accordingly acted within their lawful discretion in declining to lease the Municipal Auditorium or the Tivoli Theater unto the plaintiff.

In conclusion, it is not inappropriate to note that musical, literary, and dramatic ability are scarce talents. Vulgarity, nudity, and obscenity are abundant and readily available commodities. All are good box office. The temptation to substitute the latter commodities for the former talents has become well nigh irresistible in the entertainment world in recent years. "Hair" found musical talent. It combined it with vulgarity, nudity, and obscenity to come up with a box office hit.

An order will enter dismissing this lawsuit.

JURY INSTRUCTIONS

APPENDIX

This case has its basis in the First Amendment of the Constitution of the United States. You will recall that when I summarized for you the contentions of the parties, I advised you that the plaintiff was making the contention that the defendants had discriminated against the plaintiff

by denying the plaintiff a lease upon the Tivoli Theater and/or the Municipal Auditorium, and that the denial of such lease was in fact and in law a denial of the plaintiff's right of freedom of speech and of freedom of expression as secured to the plaintiff by the First Amendment and the Fourteenth Amendment of the Constitution of the United States. The First Amendment right of freedom of speech and freedom of expression extends to the plaintiff even though the plaintiff is a corporation. It is entitled to exactly the same right under the First Amendment with regard to freedom of speech and freedom of expression as would be any individual.

Upon the other hand, the defendants have denied that their action in refusing to lease the Tivoli Theater and/or the Municipal Auditorium was in violation of the plaintiff's right to freedom of speech or the plaintiff's right to freedom of expression or to the plaintiff's rights under either the First or Fourteenth Amendments of the United States Constitution. The defendants contend that the theatrical production which the plaintiff proposes to present and for which it seeks a lease is obscene and as such it accordingly is not entitled to the protection either of the First Amendment or of the Fourteenth Amendment of the United States Constitution. The issue for your decision, accordingly, has its legal basis in the First Amendment of the United States Constitution and the application of that Amendment to the facts of this case.

More particularly, the issue for your decision has its legal basis in the freedom of speech provision of the First Amendment. The relevance of referring to the Fourteenth Amendment in this regard is that the due process clause of the Fourteenth Amendment has the effect of making the provisions of the First Amendment binding upon the states and the cities and the local governments of this Nation as well as upon the Federal Government. You see, as

originally adopted, the First Amendment only purported to prohibit the United States Congress from making laws abridging freedom of speech, freedom of religion and freedom of assembly. But with the adoption of the Fourteenth Amendment, requiring that state and local governments extend due process of law to all persons, that Amendment had the effect of making the First Amendment binding upon the states, cities, and local governments within this Nation also.

Let me read for you the First Amendment of the United States Constitution. It reads as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Although the Amendment refers, as I have said, to the Congress, as I have further just explained to you, it is equally applicable to the government at all levels, including the State of Tennessee and the City of Chattanooga and including the defendants to this lawsuit, who, as members and officials of the Chattanooga Auditorium Board, are an arm of the City of Chattanooga and as such are subject to the prohibitions of the First Amendment.

The First Amendment as it relates to the issues in this lawsuit accordingly prohibits the defendants from taking any action which would have the effect of denying the plaintiff its right to freedom of speech as guaranteed in the First Amendment of the Constitution. You are instructed in this regard that a theatrical production as a mode of expression or as a mode of conveying ideas or entertainment is entitled to the protection of the freedom of speech provision of the First Amendment. However, freedom of speech is not an absolute or all encompassing

right. By that, I mean not every form of expression may claim to be protected by the constitutional guarantee of freedom of speech. One form of expression that does not come within the protection of the First Amendment is obscenity. That is, the denial to a person of the right to express himself in a manner that falls within the legal definition of obscenity is not a violation of that person's right to freedom of speech. Accordingly, the defendants may lawfully refuse to lease either the Tivoli Theater and/or the Municipal Auditorium to the plaintiff if the theatrical production "Hair" which the plaintiff proposes to present is obscene as I shall proceed to define that word "obscene" for you.

The word "obscene" is, of course, a word in common use and is a part of our everyday language. As we use it in our everyday language and as it is defined in Webster's Dictionary, it means "foul; disgusting; lewd." That, however, is not the definition that you must apply in testing the issue of obscenity in this case.

Now, I only point that out to you to point out that it is not the definition of legal obscenity. As I am using the word "obscene" in these instructions, it has a special, legal definition and you must apply that legal definition in deciding the issue that is for your decision in this case. The United States Supreme Court has defined (in the case of *Roth* v. *United States,* 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, as amplified in *Manuel Enterprises, Inc.* v. *Day,* 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639) the word "obscenity" as it relates to matters that do not fall within the protection of the freedom of speech provision of the First Amendment. This Court and this jury are bound by that definition and must follow that definition in making their determination in this case.

As defined by the United States Supreme Court, legal obscenity is any material to which the "average person,

applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

Let me read the definition over for you again. As defined by the United States Supreme Court, legal obscenity is any material which to "the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

Now, the Court goes further to define certain of those terms and expressions in that definition and I will give you those instructions likewise; but suffice it to say at this point that before the jury could find the theatrical production that is the subject of this lawsuit obscene, it must determine whether, to the average person applying contemporary community standards, the dominant theme of the material in that theatrical production taken as a whole appeals to prurient interest.

Let me now break that definition down for you into its component parts and explain for you the meaning of certain words and phrases as are used in that definition and as they have been further defined by the United States Supreme Court. You will notice that the first part of the definition refers to the average person applying contemporary community standards. The community standard here referred to is not a standard that varies from one locality to another within the Nation but rather means the contemporary national community standards.

You will notice that the second part of the definition of obscenity as established by the United States Supreme Court is that "the dominant theme of the material taken as a whole appeals to prurient interest." The phrase, "the dominant theme of the material taken as a whole," means that the theatrical production here challenged as obscene must be judged as a whole. The phrase "appeals to the prurient interest," means having a tendency to excite lust-

ful thoughts or material that appeals to a shameful or morbid interest in sex and is utterly without redeeming social value. The material must be patently offensive in that it goes substantially beyond contemporary limits of candor in description or representation of such matters.

Thus, by way of summing up, before the theatrical production here in issue can be found to be legally obscene, these elements must coalesce: It must be established, first, that the dominant theme of the material taken as a whole appeals to a prurient interest in sex; and, second, that the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and, third, that the material is utterly without redeeming social value.

Now, in making your determination with regard to obscenity or non-obscenity, you will not be concerned with whether the material in the play is pro-religion or anti-religion; you will not be concerned with whether the material is pro-pollution or anti-pollution; you will not be concerned with whether the material is pro-free love or anti-free love; you would not be concerned with whether it is pro-drug culture or anti-drug culture; you would not be concerned with whether it is pro-parental authority or anti-parental authority; you would not be concerned with whether it is pro-war, anti-war or whether it is pro-government or anti-government or whether it expresses popular ideas or unpopular ideas. The concept of obscenity cannot be based upon the ideas that may be expressed, whether those ideas express these concepts or not. We are not here to judge those matters but rather you want to follow the definition of obscenity as I have given it to you in these instructions. In other words, it is not a question of whether you agree or disagree with the ideas being expressed or conveyed in the theatrical production "Hair." The ques-

tion is whether or not the material is obscene as I have defined that term or given you that definition.

So far in these instructions, in defining obscenity, I have been referring to speech in all of its forms, including conduct that is so closely related to speech as to be considered symbolic speech or expressive of speech. Just as speech may be obscene, likewise conduct, apart from speech or apart from conduct that is expressive of speech, may be obscene. However, there is a difference in obscenity as it refers to speech on the one hand, which I have just defined for you, and obscenity as it refers to conduct separate and apart from speech upon the other hand.

The freedom of speech provisions of the First Amendment refer to speech and not to human conduct that is not expressive of speech; that is, conduct apart from speech or conduct that is not so closely related to speech as to constitute symbolic speech as it is sometimes referred to. Since the freedom of speech provision of the First Amendment accords no protection against the regulation of human conduct by the government, whether federal, state or local, the freedom of speech provision of the First Amendment accords no protection against the regulation of obscene conduct by the various levels of government. Since the obscenity statutes and the ordinances relied upon by the defendants in this case apply to both obscene speech and to obscene conduct, then irrespective of how you may decide the issue of obscenity as it relates to the theatrical production "Hair" when considered as speech, and when considered as a whole, you should turn your attention to the conduct of the performers in the theatrical production "Hair" that is not speech or is not conduct that may be considered symbolic speech or expressive of speech and determine whether that conduct is obscene as I shall now define the word.

The definition of obscenity as it relates to conduct apart

from speech is the same as the definition of obscenity as it relates to speech with two exceptions. The first exception is that since no First Amendment federal constitutional issue is involved, obscene conduct may be judged in its component parts rather than merely judging the whole conduct or merely judging the whole of the theatrical production in making your judgment regarding obscenity on the basis of conduct as a whole or of the material of the production as a whole; that is, conduct may be adjudged obscene or non-obscene either as a whole or in any of its component parts.

The second difference between the definition of obscenity as it applies to conduct rather than speech is that since no First Amendment federal constitutional issue is involved, the community standard by which the conduct is to be judged is the community standard of the State of Tennessee rather than the community standard of the Nation as a whole. Thus, obscenity as it relates to conduct apart from speech means, first, conduct that appeals to the prurient interest in sex; and, second, conduct that is patently offensive because it affronts contemporary standards. The standards here referred to being those of the state in which the conduct occurs; and, third, conduct that is utterly without redeeming social value.

In addition to the matters I have instructed you, you are further instructed with regard to the issue of obscenity that not every portrayal of male or female nudity is necessarily obscene. It depends, of course, upon the context and circumstances. The portrayal of sex in art, literature or scientific works is not of itself sufficient reason for denying material the constitutional protection of freedom of speech; and, likewise, foul words just standing alone without regard to context of the whole content do not constitute legal obscenity as I have defined that term for you.

APPENDIX "B"

No. 72-1672
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SOUTHEASTERN PROMOTIONS, LTD.,
Plaintiff-Appellant,
v.
STEVE CONRAD, ET AL.,
Defendants-Appellees.

APPEAL FROM THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE.

Decided and Filed May 30, 1973.

Before WEICK and McCREE, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

O'SULLIVAN, Senior Circuit Judge.

This is an appeal from dismissal of plaintiff-appellant's complaint seeking a declaratory judgment and a mandatory injunction whereby to require the Municipal Auditorium Board of Chattanooga, Tennessee, to lease a municipal theatre to appellant, there to exhibit the stage play HAIR. The theatre in question was under the control of such Auditorium Board. The case was heard at Chattanooga by the Honorable Frank W. Wilson, Chief Judge of the United States District Court for the Eastern District of Tennessee, Southern Division. He denied the relief asked by plaintiff-appellant.

We affirm the judgment of the District Court on the opinion of the District Judge. Such opinion is reported

as *Southeastern Promotions, Inc.* v. *Steve Conrad*, 341 F. Supp. 465 (E.D. Tenn. 1972).

While we adopt such opinion, we think it right to say this much more. After disposing of several grounds asserted by defendants to support their motion to dismiss, as without validity, the District Judge set out the controlling issues as follows:

> *"Trial on the Merits*
>
> "Turning to the merits of this lawsuit, the pleadings raise essentially the issue of whether the defendant Board acted within its lawful discretion in declining to lease its theater and/or auditorium facility to the plaintiff for the reason that the plaintiff's theatrical production 'Hair' would violate Paragraph (1) of the standard lease form requiring the lessee to comply with all state and local laws in its use of the leased premises. More specifically, the issue presented by the pleadings is whether the theatrical production 'Hair' would violate any constitutionally valid provision of the common law of Tennessee relating to indecent exposure, gross indecency, or lewdness or would violate any constitutionally valid provision of City ordinances and State statutes which, among other matters, purport to make public nudity and obscene acts criminal offenses." 341 F. Supp. at 471.

With instructions, the propriety of which appellant does not challenge, there was submitted to an advisory jury the question of whether the production was obscene. Their verdict said that it was. The judge, then reviewing the same evidence and correctly employing the governing rules, made his own finding that the play was obscene.

At the outset, we think that understanding of this decision will be aided by setting out the style, action and content of HAIR as recited in the District Court's opinion. That such recital was accurate is not here challenged by plaintiff-appellant. Here it is:

"Findings of Fact

"Turning first to the issue of obscenity, the script, libretto, stage instructions, musical renditions, and the testimony of the witnesses reflect the following relevant matters (It should be noted that the script, libretto, and stage instructions do not include but a small portion of the conduct hereinafter described as occurring in the play):

"The souvenir program as formerly distributed in the lobby (Exhibit No. 1) identified the performers by picture and biographical information, one female performer identifying herself as follows:

> 'Hobbies are picking my nose, fucking, smoking dope, astro projection. All that I am or ever hope to be, I owe to my mother.'

It was testified that distribution of this program had now been discontinued. Prior to the opening of the play, and to the accompaniment of music appropriate to the occasion, a 'tribe' of New York 'street people' start gathering for the commencement of the performance. In view of the audience the performers station themselves in various places, some mingling with the audience, with a female performer taking a seated position on center stage with her legs spread wide to expose to the audience her genital area, which is covered with the design of a cherry. Thus the stage is set for all that follows. The performance then begins to the words and music of the song 'Aquarius,' the melody of which, if not the words, have become nationally, if not internationally, popular, according to the evidence. The theme of the song is the coming of a new age, the age of love, the age of 'Aquarius.' Following this one of the street people, Burger, introduces himself by various prefixes to his name, including 'Up Your Burger,' accompanied by an anal

finger gesture and 'Pittsburger,' accompanied by an underarm gesture. He then removes his pants and dressed only in jockey shorts identifies his genitals by the line, 'What is this God-damned thing! 3,000 pounds of Navajo jewelry! Ha! Ha! Ha!' Throwing his pants into the audience he then proceeds to mingle with the audience and, selecting a female viewer, exclaims, 'I'll bet you're scared shitless.'

"Burger then sings a song, 'Looking for My Donna,' and the tribe chants a list of drugs beginning with 'hashish' and ending with 'Methadrine, Sex, You, WOW!'" (Exhibit No. 4, p. 1-5). Another male character thing sings the lyric.

> 'SODOMY, FELLATIO, CUNNILINGUS, PEDERASTY — FATHER WHY DO THESE WORDS SOUND SO NASTY! MASTURBATION CAN BE FUN. JOIN THE HOLY ORGY, KAMA SUTRA, EVERYONE.' (Exhibit No. 4, p. 1-5)

"The play then continues with action, songs, chants, and diaglogue making reference by isolated words, broken sentences, rhyme, and rapid changes to such diverse subjects as love, peace, freedom, war, racism, air pollution, parents, the draft, hair, the flag, drugs, and sex. The story line gradually centers upon the character Claude and his response and the response of the tribe to his having received a draft notice. When others suggest he burn his draft card, he can only bring himself to urinate upon it. The first act ends when all performers, male and female, appear nude upon the stage, the nude scene being had without dialogue and without reference to dialogue. It is also without mention in the script. Actors simulating police then appear in the audience and announce that they

are under arrest for watching this 'lewd, obscene show.'

"The second act continues with song and dialogue to develop the story of Claude's draft status, with reference interspersed to such diverse topics as interracial love, a drug 'trip,' impersonation of various figures from American history,[2] religion, war, and sex. The play ends with Claude's death as a result of the draft and the street people singing the song, 'Let the Sunshine In,' a song the testimony reflects has likewise become popular over the Nation.

"Interspaced throughout the play, as reflected in the script, is such 'street language' as 'ass' (Exhibit No. 4, pp. 1-20, 21 and 2-16), 'fart' (Exhibit No. 4, p. 126), and repeated use of the words 'fuck'[3] and the four letter word for excretion (Exhibit No. 4, pp. 1-7, 9 and 41). In addition, similar language and posters containing such language were used on stage but not reflected in the script.

"Also, throughout the play, and not reflected in the script, are repeated acts of simulated sexual intercourse. These were testified to by every witness who

[2] Lincoln is regaled with the following lyrics: 'I's free now thanks to you, Massa Lincoln, emancipator of the slave, yeah, yeah, yeah! Emanci — mother fucking — pater of the slave, yeah! yeah! yeah! Emanci — mother fucking — pater of the slave, yeah! yeah! yeah!' With Lincoln responding, "Bang my ass . . . I ain't dying for no white man!'

[3] A woman taking her departure says to the tribe, 'Fuck off, kids.' (Exhibit No. 4, p. 1-35). The following dialogue occurs as Claude nears his death scene:

'Burger: I hate the fucking world, don't you?
'Claude: I hate the fucking world, I hate the fucking winter, I hate these fucking streets.
'Burger: I wish the fuck it would snow at least.
'Claude: Yeah, I wish the fuck it would snow at least.
'Burger: Yeah, I wish the fuck it would.
'Claude: Oh, fuck!
'Burger: Oh, fucky, fuck, fuck!' (Exhibit No. 4, p. 2-22)"

had seen the play. They were often unrelated to any dialogue and accordingly could not be placed with accuracy in the script. The overwhelming evidence reflects that simulated acts of anal intercourse, frontal intercourse, heterosexual intercourse, homosexual intercourse, and group intercourse are committed throughout the play, often without reference to any dialogue, song, or story line in the play. Such acts are committed both standing up and lying down, accompanied by all the bodily movements included in such acts, al lthe whole the actors and actresses are in close bodily contact. At one point the character Burger performs a full and complete simulation of masturbation while using a red microphone placed in his crotch to simulate his genitals. The evidence again reflects that this is unrelated to any dialogue then occurring in the play. The evidence further reflects that repeated acts of taking hold of other actors' genitals occur, again without reference to the dialogue. While three female actresses sing a song regarding interracial love, three male actors lie on the floor immediately below them repeatedly thrusting their genitals at the singers. *At another point in the script (Exhibit No. 4, p. 2-22) the actor Claude pretends to have lost his penis. The action accompanying this line is to search for it in the mouths of other actors and actresses.*

341 F.Supp. at 472-474 (Emphasis supplied).

The instructions which the District Judge gave to the jury are also set out in his opinion. While appellant, as a second position, asserts that the play HAIR is not in fact obscene, the principal thrust of its address to us is that the producer's First Amendment right to free speech forbids any interference with the exhibition of the play. They fault the District Judge for allegedly considering

the obscene conduct in the play independently from its "speech." Their argument appears to be that obscenity must be tolerated if it is a part of the same vehicle whereby First Amendment rights are allegedly being exercised. They say:

> "These forms of communication [motion pictures or plays] are to be treated for what they are, not artificially carved into speech and 'something else.' • • •
>
> "We think it apparent then that the judge's attempt to draw an artificial distinction between speech and conduct is wholly without support in either reason or authority."

We agree with the District Judge that free speech cannot be used as a vehicle to carry obscenity—thus to allow, without limit, public exhibition of obscenities. We must be aware that the speech of the play is employed to give meaning to the physical conduct of the players. While it is not necessary to affirmance of the District Judge, we are persuaded that the play's language—its speech—is itself obscene. Whether the play is considered separately as to its speech and its conduct, or they are joined, it is obscene.

Appellant's brief does not provide a succinct expression of a message conveyed by HAIR. From our reading of the witnesses who found, and attempted explanation of its message, we assume the message was to expose the "hypocrisy" of today's middle class, middle aged society, in its attitude toward sex. We do not think that any society can be charged with hypocrisy for finding less than beautiful,

> "SODOMY, FELLATIO, CUNNILINGUS, PEDERASTY — FATHER, WHY DO THESE WORDS SOUND SO NASTY?
> MASTURBATION CAN BE FUN.
> JOIN THE HOLY ORGY, KAMA SUTRA, EVERYONE."

The foregoing is a part of the lyrics of one of the play's songs. We are not persuaded that the First Amendment can be construed as providing that "anything goes" so long as a message is claimed to be given.

Appellant emphasizes the success that has attended the showing of HAIR, saying:

> "HAIR is a musical which deals with the life styles of many young people and their attitudes on the Vietnam war, racism, sex, drugs, pollution, etc. It has been produced in 140 American cities and in fourteen cities throughout the remainder of the world. *HAIR is the most popular box office attraction in the history of American theatre.*" (Emphasis supplied.)

One of appellant's witnesses, in speaking of HAIR's message, said that the play expresses "the hoped for *cleansing and rebirth* of this society," (Emphasis supplied). It was asserted by another, who compared HAIR with the musical "Oklahoma":

> "It [HAIR] brought a new kind of music to the theatre and a new seriousness even beyond that of 'Oklahoma' ".

Two college professors supported the claim that HAIR expressed a worthwhile message. A player identified himself as follows: "George Burger, Unzipped Burger, Pull 'em down Burger, Up Your Burger," and as recited by the District Judge, this was accompanied by an anal finger gesture. One of the professors said of this, "I think in some context it can have redeeming social value."

We ponder whether HAIR's box office success supports appellant or merely portrays that those charged with enforcing the law have now despaired of success in attempts to frustrate the obscenity and pornography which is being thrust upon today's total society.

Appellant says that the few district courts which have denied relief to the producers of HAIR were reversed on

appeal, citing *Southeastern Promotions, Ltd.* v. *City of West Palm Beach*, 457 F.2d 1016 (5th Cir. 1972); *Southeastern Promotions, Ltd.* v. *Oklahoma City, Oklahoma*, 459 F.2d 282 (10th Cir. 1972); and *Southeastern Promotions, Ltd.* v. *City of Mobile, Alabama*, 457 F.2d 340 (5th Cir. 1972). It will be sufficient to say that in none of these cases was obscenity *vel non* in issue.

We consider that the District Judge's opinion adequately discusses and disposes of all of the issues before him.

Judgment affirmed.

WEICK, Circuit Judge, concurring. I concur in Judge O'Sullivan's opinion. I would add only a few comments.

Ordinarily, an owner of real property may rent it to whomever he pleases. He would have the right to decide whether he ought to rent his property to persons who desire to exhibit conduct which is not in good taste. Certainly no court should order him under the First Amendment to exhibit offensive conduct portraying immoral sexual acts of the worst sort.

The auditorium involved in this case belonged to the City, which is a political subdivision of the State. It was constructed with taxpayers' money. It goes without saying that the city fathers could not be compelled to rent the auditorium to a person who desired to operate therein a house of ill fame, in violation of state law. Yet the conduct exhibited by the film in the present case is even worse as it portrays obscene sexual acts which could be committed only by depraved persons.

We do not consider here the right of a person to exhibit such a film on his own property or on property which he has rented. Our case involves only the question whether a federal court has any right to order the state to permit

the exhibition for profit of filthy, obscene, sexual material on state property. Federal Courts ought not take over the operation of state facilities.

In *California* v. *LaRue*, 409 U.S. 109 (1972), the Court upheld the right of the state to prohibit the exhibition of obscene material in a private saloon. Here, we are dealing, not with private property, but with public property and with police power of the state.

As pointed out in *LaRue*, the First Amendment protects "expression", not "action". Our case involves only depraved sexual action.

We would doubt that a Federal Court would ever attempt to compel the Federal Government to rent its property for any such immoral purpose. It is also inconceivable that a Federal Court would order such an exhibition to be held in the Eisenhower Theatre located in the John F. Kennedy Center for the Performing Arts at the Capitol. State facilities should be treated with the same respect as federal facilities.

No one has a constitutional right to exhibit obscene sexual acts in public buildings.

•

MCCREE, Circuit Judge (Dissenting). I respectfully dissent. I believe Judge Edenfield correctly stated the test to be applied in determining whether a play is obscene in his opinion in *Southeastern Promotions, Ltd.* v. *City of Atlanta*, 334 F. Supp. 634, 639 (N.D. Ga. 1971), in which an official of the Atlanta Civic Center refused to lease the auditorium for the exhibition of "Hair":

> The court cannot accept the proposition that stage productions may be dissected into 'speech' and 'non-speech' components as those terms have been used by the Supreme Court. The nonverbal elements in a

> theatrical production are the very ones which distinguish this form of art from literature. It may be true that First Amendment protections vary in different media, but a musical play must be deemed a unitary form of constitutionally protected expression. The court concludes that the entire musical play 'Hair' is speech and entitled to First Amendment protection.

The District Judge in our case sought unsuccessfully to distinguish Judge Edenfield's opinion by stating:

> The fallacy of that position is readily apparent, however, if any crime other than the crime of obscenity were committed in the course of a live stage production. That Court would doubtless have no difficulty in disecting [sic] speech and nonspeech components if the crime committed on the stage were the crime of rape or homicide, even though called for in the script. It is a false and dangerous doctrine that the First Amendment forbids all regulation of conduct so long as that conduct masquerades under the guise of the theatrical.

Southeastern Promotions, Ltd. v. *Conrad,* 341 F. Supp. 465, 476 (E.D. Tenn. 1972). It begs the question to call an act viewed in isolation as criminal when the constitutional test of criminality *vel non* requires it to be examined in context. *Roth* v. *United States,* 354 U.S. 476 (1956); *Memoirs* v. *Massachusetts,* 388 U.S. 413 (1966).

As Mr. Justice Marshall stated in his dissent in *California* v. *LaRue,* 409 U.S. 109, 130 (1972):

> If, as these many cases hold, movies, plays and dance enjoy constitutional protection, it follows, ineluctably I think, that their component parts are protected as well. It is senseless to say that a play is 'speech' within the meaning of the First Amendment, but that the individual gestures of the actors are 'conduct' which the State may prohibit.

The majority opinion in *LaRue* implicitly rejected the technique of excerpting and censoring specific conduct from a protected vehicle. In observing that "[t]he state regulations here challenged come to us, not in the context of censoring a dramatic performance in a theatre, but rather in the context of licensing bars and nightclubs to sell liquor by the drink," 409 U.S. at 114, the Court acknowledged that some of the performances banned by the regulations from presentation in establishments licensed to sell liquor by the drink would have been protected if offered in a theater:

> We do not disagree with the District Court's determination that these regulations on their face would proscribe some forms of visual presentation that would not be found obscene under *Roth* and subsequent decisions of this Court. See, *e.g., Sunshine Book Co.* v. *Summerfield,* 355 U.S. 372 (1958) rev'g *per curiam,* 101 U.S. App. D.C. 358, 249 F. 2d 114 (1957). But we do not believe that the state regulatory authority in this case was limited to either dealing with the problem it confronted within the limits of our decisions as to obscenity, or in accordance with the limits prescribed for dealing with some forms of communicative conduct in *O'Brien, supra.*
>
> . . .
>
> The substance of the regulations struck down prohibits licensed bars or nightclubs from displaying, either in the form of movies or live entertainment, "performances" that partake more of gross sexuality than of communication. While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the

critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink.

Viewed in this light, we conceive the State's authority in this area to be somewhat broader than did the District Court. This is not to say that all such conduct and performance is without the protection of the First and Fourteenth Amendments. But we would poorly serve both the interests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries that the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theatre. 409 U.S. at 116, 118.

Nevertheless, and perhaps because of reluctance to rely solely on the theory of the District Court, my brothers in this appeal make their own additional finding (consistent with that of the advisory jury) that the play "Hair," viewed as a whole, is obscene. With this determination I also disagree. However, instead of contributing further to the already too extensive and inelegant legal literature recounting tawdry details of challenged works, I observe merely that I know an obscene play when I see one and upon autoptic view "Hair" is not that. *See Jacobellis* v. *Ohio,* 378 U.S. 184, 197 (1963) (Stewart, J., concurring).

I would reverse and remand with instructions to grant the relief prayed for.

APPENDIX "C"

No. 72-1672

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SOUTHEASTERN PROMOTIONS, LTD.,
Plaintiff-Appellant,

v.

STEVE CONRAD, ET AL.,
Defendants-Appellees.

ORDER.

Decided and Filed October 30, 1973.

Before WEICK and McCREE, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

THIS CAUSE is before the Court upon the motion of Plaintiff-Appellant for rehearing, with suggestion for rehearing en banc; and Appellees having filed a brief responsive to said motion, as ordered by this Court; upon request for a vote to be taken, a majority of the active judges of this Court voted against such rehearing en banc. Therefore,

IT IS ORDERED that rehearing in banc be, and the same is, hereby denied. Judge Edwards and Judge McCree dissent.

Such motion for rehearing in banc having been denied, the matter of rehearing has been considered and will be disposed of by the panel that originally heard the appeal. Therefore,

IT IS ORDERED that the petition of Plaintiff-Appellant for rehearing be, and the same is, hereby denied. Judge McCree dissents.

Entered by order of the Court.

JAMES A. HIGGINS
Clerk

WEICK, Circuit Judge, and O'SULLIVAN, Senior Circuit Judge.

Judge Edwards' dissent from denial of an in banc rehearing, with concurrence of Judge McCree, suggests the propriety of this supplement to the original majority opinion.

The dissent asserts:

> "Unless the Supreme Court grants certiorari, this case will represent a final adjudication that the play 'Hair' is obscene and subject to being banned under state obscenity laws in Michigan, Ohio, Kentucky and Tennessee • • •."

We respectfully disagree. The procedural setting of this litigation makes clear the invalidity of such observation, as well as the inapplicability of the authorities cited in the dissent.

This case involved an action in equity. Plaintiff sought the aid of equity for a declaratory judgment and a mandatory injunction to require the Board of Directors of the Chattanooga Memorial Auditorium to allow exhibition therein of the play HAIR. The complaint relied on 42 U.S.C. §§ 2201 and 2202, which empower courts of equity to enter declaratory judgments. The complaint also averred deprivation of civil rights, but nowhere does the plaintiff assert a civil right to put on its show wherever it chooses. The following general principles apply to the granting or withholding of the relief sought by appellant.

> "Injunction is distinctly an *equitable remedy*, the power to grant which stands forth as a distinct head of equitable jurisprudence and the principal and most important of its issued processes." 42 Am. Jur. 2d. *Injunctions* § 2, at 727-28 (1969). (Emphasis supplied.)

Application for such equitable relief invokes the Court's discretion.

> "Injunctive relief, whether prohibitory or mandatory, is granted or withheld in the exercise of sound judicial discretion • • • •." 42 Am. Jur. 2d. *Injunctions* § 20, at 751 (1969).

Applications for a declaratory judgment are likewise addressed to equity's discretion. In *Eccles* v. *Peoples Bank*, 333 U.S. 426, 431 (1948), the Supreme Court said:

> "A declaratory judgment, like other forms of *equitable relief*, should be granted only as a matter of judicial discretion, exercised in the public interest." (Emphasis supplied.)

In *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148 (1967) the Court said:

> "The injunctive and declaratory judgment remedies are discretionary, • • • •."

The history and purpose of the creation of Soldiers & Sailors Memorial Auditorium by the people of Chattanooga are set out in a booklet which was received in evidence at trial. Its preface recites:

> "The dedication of the Soldiers and Sailors Memorial Auditorium marks, as permanently as the work of finite hands may mark, the grateful appreciation in which Chattanooga holds her sons who offered their lives to the Nation's service in the great World War [World War I].
>
> "We erect for posterity, in commemoration of their patriotism, a hall in which mementoes of their achievement may rest; an auditorium in which great bodies of our people may assemble for civic service; *for the cultivation of the arts; for the promotion of a higher and a broader citizenship.* It is fitting and well that

our tribute should take this form." (Emphasis supplied.)

The booklet, "Souvenir of Dedication" under a heading, "Its Operation and Management" sets out:

"It is the hope and ambition of the Board of Directors of the Soldiers and Sailors Memorial Auditorium to conduct the operation of the building in such manner as to render the greatest possible service to all the people of Chattanooga, Hamilton County and this section of the South.

"It will be their endeavor to make it the community center of Chattanooga, where civic, educational, religious, patriotic and charitable organizations and associations may have a common meeting place to discuss and further the upbuilding and general welfare of the city and surrounding territory.

"It will not be operated for profit, and no effort to obtain financial returns above the actual operating expenses will be permitted. *Instead its purpose will be devoted for cultural advancement, and for clean, healthful, entertainment which will make for the upbuilding of a better citizenship.*" (Emphasis supplied.)

The booklet's picture of the auditorium shows it to be a beautiful and commodious public building. The plaintiff-appellant, a New York Corporation — booking agent for the play HAIR — first sought to use a theatre, the Tivoli, a one-time commercial theatre which had been acquired by the City. Desiring, however, the larger capacity of the auditorium, the plaintiff sought equity's aid to force opportunity to use it. A witness for plaintiff testified that a one-night production of their play in the auditorium would have made a profit in excess of $10,000. Having in mind the purposes for which the people of Chattanooga created their Soldiers & Sailors Memorial Auditorium, a court of

equity cannot be faulted for withholding its writ whereby to command the Directors of the Auditorium to allow exhibition therein of a production containing the language and conduct set out in the District Judge's opinion.

We are not persuaded that the great principles which control employment of equitable remedies must stand aside when the courts are dealing with the ever-widening contests requiring resolution of what is and what is not obscenity. We had thought that Judge Weick's concurring opinion succinctly exposes the validity of this conclusion. We are constrained, however, by the current dissent to make these more extensive observations.

It is true that the District Judge did make a finding that the play HAIR is obscene and a violation of the ordinances of the City of Chattanooga and the statutes of Tennessee. In the original opinion of Judge O'Sullivan such a finding was approved. We believe, however, that it was not improper for the District Judge to consider whether the play was obscene before determining whether or not to order the Directors of the Auditorium to allow its exhibition in Chattanooga.

While we do not claim that its facts make our opinion in *Associated Students of Western Kentucky University* v. *Downing*, 475 F.2d 1132 (6th Cir. 1973) a totally controlling precedent, we cite it as being consonant with what we say here. There, the governing officials of the named University cancelled a booking contract which it had previously made for the showing of a moving picture film described in the opinion. As here, plaintiffs sought a declaratory judgment and injunctive relief whereby to forbid the governing officials of Western Kentucky University from prohibiting exhibition of the film sponsored by plaintiffs — Associated Students of Western Kentucky University. In affirming refusal of the governing Board of the University to allow exhibition of the film, we said:

"In the present case the University did nothing more than to make a determination that, with respect to a particular experimental film, it would be 'inappropriate for the University to continue as a contracting party.' " 475 F.2d at 1134.

We have considered the recent decisions of the Supreme Court in *Miller* v. *California*, —— U.S. ——, 41 U.S.L.W. 4925 (1973), and *Paris Adult Theatre* v. *Slaton, District Attorney*, —— U.S. ——, 41 U.S.L.W. 4935 (1973), and consider that our decision and that of the District Court in the case before us are not inconsistent therewith.

EDWARDS, J., dissenting, with whom MCCREE, J., joins:

One of the "basic guidelines" recently reaffirmed by the Supreme Court in relation to the determination of a charge of obscenity is "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller* v. *California*, —— U.S. ——, —— (1973), 41 U.S.L.W. 4925, 4928 (June 21, 1973). *See also Roth* v. *United States*, 354 U.S. 476 (1957).

In this case the Municipal Auditorium Board of the City of Chattanooga has refused to rent the auditorium for the presentation of the play "Hair." A United States District Court has refused to grant relief from the board's decision on the ground that "Hair" is obscene. A panel of this court has affirmed the District Court, also holding that "Hair" is obscene. And the majority of our court has now rejected a motion to rehear the case in banc. All of this has been accomplished without any one of those participating in rejecting the play ever having seen it.[1] And at no level has any board member or judge entered a finding that the play "lacks serious literary, artistic, political, or scientific value."

[1] Judge McCree who did see the play dissented from the majority opinion characterizing it as obscene.

While I would agree that at least some of the acts described so vividly in the opinions of the District Court (*Southeastern Promotions, Ltd.* v. *Conrad, et al.*, 341 F. Supp. 465 (E.D. Tenn. 1972)) and of this court (*Southeastern Promotions, Ltd.* v. *Conrad, et al.*, —— F.2d —— (6th Cir. 1973)) could, if viewed separately, appropriately be labelled obscene under the present standards of the United States Supreme Court (*see Miller* v. *California, supra*, 41 U.S.L.W. at 4928.) I do not agree that the play may be judged obscene, unless it is "taken as a whole" for purposes of that judgment. Thus far we have signally failed to do this. Taking words and sentences out of context, taking gestures employed in a play without reference to the rest of the play as has been done herein does not comply with the standard[2] set out in *Miller, supra*, and *Roth, supra*.

Over and above the first amendment violation described above the procedures employed to ban this play amounted to unconstitutional prior restraint on speech. *See Paris Adult Theatre* v. *Slaton*, —— U.S. ——, 41 U.S.L.W. 4935 (June 21, 1973); *Blount* v. *Rizzi*, 400 U.S. 410, 417 (1971); *Teitel Film Corp.* v. *Cusack*, 390 U.S. 139, 141-42 (1968); *Freedman* v. *Maryland*, 380 U.S. 51, 58-59 (1965).

Additionally the standards employed by the Municipal

[2] "A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

The basic guidelines for the trier of fact, must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, *Kois* v. *Wisconsin*, *supra*, 408 U.S. [229], at 230 (1972), quoting *Roth* v. *United States*, *supra*, 354 U.S., at 489 (1957) (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 41 U.S.L.W. at 4927-28.

Auditorium Board in rejecting the application for rental at the theatre are clearly unconstitutionally vague.[3]

Unless the Supreme Court grants certiorari, this case will represent a final adjudication that the play "Hair" is obscene and subject to being banned under state obscenity laws in Michigan, Ohio, Kentucky and Tennessee — and this, we repeat, without any board member or judge so holding ever having seen the play.

My colleagues Judges Weick and O'Sullivan appear to dispute the accuracy of the paragraph above. I will let the record speak for itself.

Judge O'Sullivan's opinion, in which Judge Weick concurred, said:

> We affirm the judgment of District Court on the opinion of the District Judge.

The opinion of the District Court held:

> This Court is accordingly of the opinion that the theatrical production "Hair" contains conduct, apart from speech or symbolic speech, which would render it in violation of both the public nudity ordinances of the City of Chattanooga and the obscenity ordinances and statutes of the City and of the State of Tennessee.

Reviewing the evidence independently, Judge O'Sullivan's opinion held:

> While it is not necessary to affirmance of the District Judge, we are persuaded that the play's language — its speech — is itself obscene. Whether the play is considered separately as to its speech and its conduct, or they are joined, it is obscene.

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[3] The Chattanooga Commissioner in charge of the municipal theatre testified before the District Court that the theatre was refused for presentation of "Hair" because the city permitted only productions which are "clean and healthful and culturally uplifting."